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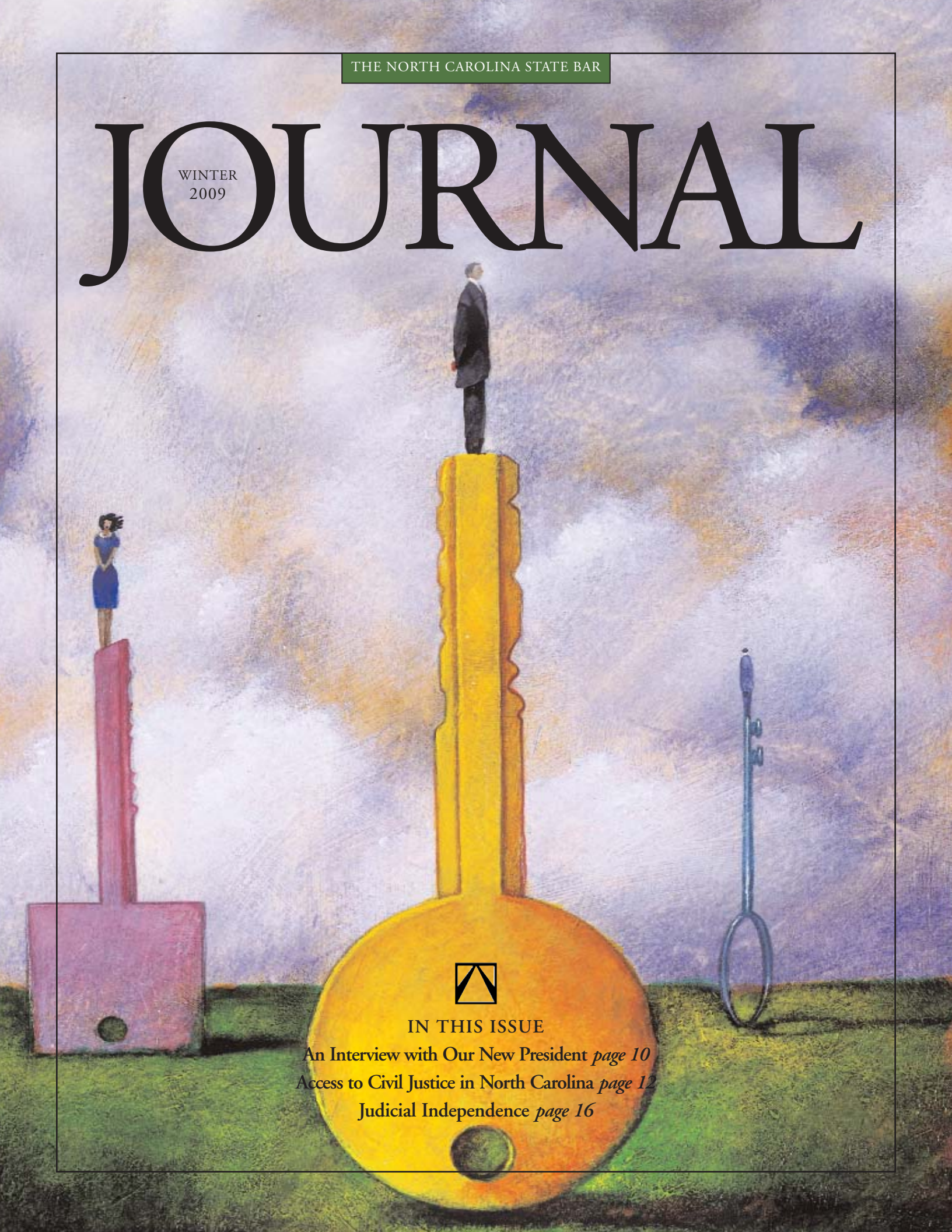

IN THIS ISSUE

An Interview with New President Barbara (Bonnie) B. Weyher

Q: What can you tell us about your roots?

Although I grew up in New York City, my family has strong roots in North Carolina. I graduated from the University of North Carolina at Chapel Hill with a BA in Journalism and then attended law school there as well, graduating in 1977. After practicing law in New York for two years, I returned to North Carolina where I have been in private practice ever since.

Q: Tell us about your family.

My husband, Dan McLamb, and I have four boys. Brad (30) is an accountant with Ernst & Young in Atlanta and will likely be transferred soon to Chicago. Will (27) lives in Raleigh and works for the Summit Hospitality Group. Our twins (20) are sophomores in college. Alex attends Davidson College, and Chris attends Washington University in St. Louis. Both want to go to law school.

Q: When and how did you decide to become a lawyer?

As strange as it seems, I did not decide to practice law until well into my first year in law school. As an undergraduate, I studied journalism with the intent of pursuing that as a career. One of my professors suggested law school as a way to have a more specialized career in journalism. By the end of my first year at UNC Law, I was certain I wanted to be a lawyer.

Q: What's it like to practice with your husband?

Wonderful. Dan and I have practiced together during our entire 22-year marriage. I cannot imagine being in a practice without him.

Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?

Since I studied journalism in college, I believe I would have pursued a career as a journalist. I like to write.

Growing up, I wanted to be a figure skater. My mother was quite an accomplished skater in her youth. Unfortunately, despite all the lessons, I just did not have her talent.

Q: During your tenure on the council, women have always been underrepresented. Why is that? Why is it important that more women and minority lawyers be elected? What are you planning to do to address this situation?

For the 11 years I have been on the State Bar Council, the number of women and minority lawyers who have run for the council has been low. Currently, of the 59 elected councilors and four officers, nine are women and two are African-American. I am not sure of the reason for the low numbers. I have wondered whether it is because of the manner in which we elect councilors or whether it is because of the large percentage of women and minority lawyers who are in solo or small practices and find it difficult to devote the time involved. To some extent, it may be due to the lack of information about State Bar Council positions.

I believe that in order to maintain and increase the public trust as we look to the future, we need to encourage and attain broad participation in the regulation of our profession. With broader representation, we will not only increase confidence in our process, but we will also have the benefit of additional backgrounds and experiences to help address the difficult challenges our profession will certainly face in the coming years.

Q: You've called for the creation of a new committee to make recommendations on means to encourage wider participation in the State Bar. Where do you see this committee going?

Former State Bar Presidents Ann Reed and Judge Calvin Murphy have generously agreed to co-chair an outreach committee charged with studying and recommending means to encourage wider participation in the North Carolina State Bar by minority and female lawyers.

Fortunately, there are a number of other mandatory bars in the country that have already undertaken similar initiatives, so our committee will not need to start from scratch but will have the benefit of their experiences. Some of the options I will ask the committee to consider are 1) informational outreach efforts to women and minority bar organizations on the work of the State Bar; 2) the use of at-large council seats; 3) wider publication of openings in council and board positions; 4) the development of internship programs; and 5) the identification of and solution to potential obstacles which may discourage minority and women lawyers from running. At the Southern Conference of Bar Presidents meeting this fall, I had the opportunity to talk with a number of leaders of mandatory bars in the Southeast who reported to me positive progress from these types of efforts. I hope that we will be able to experience the same type of progress.

Q: You've been an officer during the past two years, first as vice-president and then as president-elect. What has that been like? Does the president generally call the shots unilaterally,

or does he/she seek consensus among all the officers before taking action?

We definitely work by consensus. Former President Hank Hankins once told me that substantive change takes more than one presidential term to accomplish and that it is, therefore, critical for State Bar officers to work together toward common goals. This coming year we hope to complete the goals of immediate Past-President John McMillan, including comparability for IOLTA accounts, the adoption of Rule 6.1, and the work of the Program Evaluation Committee, which is reviewing State Bar programs to determine whether they are operating as intended and whether improvements should be made.

Tony diSanti, our current president-elect, and I have talked about my goal of increasing the number of women and minority lawyers on the State Bar Council. We have also discussed this with incoming Vice-President Jim Fox. We all know that it will take longer than one year to begin to see results. Tony and Jim are extremely supportive and are prepared to carry the initiative forward after I am gone. Continuity is critical.

Q: You live in a large city and practice with a fairly large firm. Do you think you can understand and empathize with those lawyers who live and work in rural areas of the state?

One of the greatest aspects of serving on the State Bar Council is the opportunity to work and interact with lawyers from all over the state, including small towns and rural areas. This creates great balance in the council. Lawyers from metropolitan areas learn to understand and appreciate the issues facing lawyers in small towns and vice versa. I believe we all need to be sensitive to the fact that issues and views can be different, district to district.

Q: In your opinion does it make sense for lawyers to be regulating themselves? Do we deserve the public's trust?

Yes. Self-regulation makes sense provided that we understand and appreciate that it is a privilege and not a right. With a privilege comes obligation. The State Bar exists not to promote lawyer protectionism but to protect the public. As long as we never lose sight of that duty, we will maintain the public's trust.

Q: You served on the State Bar's Grievance Committee for many years and ultimately was its chair. What do you think about the disciplinary system? Is it working? Are we doing a good job? Where can we improve?

Katherine Jean, our general counsel, and her deputy counsel, investigators, and paralegals, do an outstanding job. Not only are they zealous advocates, they are also true professionals in every sense. We ask so much of them, and they deliver.

With her husband and law partner, Dan McLamb, looking on, Barbara (Bonnie) B. Weyher is sworn in as president of the North Carolina State Bar by Chief Justice Sarah Parker.

In 2007 I was appointed by then President Steve Michael to chair a committee to review the disciplinary system to make sure it was working as efficiently, promptly, and fairly as possible. At the end of 2007, the committee made a number of recommendations which I think have significantly improved what was already a good system. We still have some work to do, particularly in the area of technology.

Q: Can you tell us where we are in regard to the planning for the State Bar's new headquarters? Do we know how big it's going to be and what it's going to look like? Do we know when it will be built? And how much it will cost?

In December 2008, the Council of State voted to permit the state to enter into a 99-year lease agreement with the State Bar on a lot on the corner of Edenton Street and Blount Street, which is within the state government complex. The cost of the lease to the State Bar will be $1.00. This past summer, the State Bar entered into a contract with Calloway, Johnson, Moore & West, PA, a Winston-Salem architectural firm, for the design of the building. The preliminary design appears on page 8 of this edition of the State Bar *Journal*. The plans call for a four-story, 60,000-square-foot building, although some of that space will not be immediately programmed but reserved for future growth. The projected cost is $14 million. We anticipate breaking ground by the end of 2010, with expected completion in mid-2012.

Q: How can you justify a dues increase at a time when so many North Carolina's lawyers are out of work or are underemployed?

Despite the current financial downturn, our bar continues to grow. We have had, and are continuing to experience, a significant increase in the number of attorneys licensed to practice in North Carolina, including lawyers coming from other states as well as from our seven in-state law schools, two of which just graduated their first classes this past spring. A record number of candidates took the bar exam this summer. Our projections show our bar doubling in size in the next 20 years. As the bar grows, the demands on our staff increase in all areas, including grievance complaints, fee dispute mediations, and ethics opinions, just to name a few.

The State Bar is completely out of space in its current building on Fayetteville Street, despite the fact that the Board of Law Examiners and LAP program are now being housed in other rental space in downtown Raleigh. This growth requires the Bar to move to new headquarters. We are told that it is a very favorable time to build, with construction costs lower than they have been in recent years, and we want to move quickly in order to take advantage of those lower costs. The lower construction costs, coupled with a lot at a nominal lease cost, will allow us to achieve considerable savings.

The new building is being designed to meet

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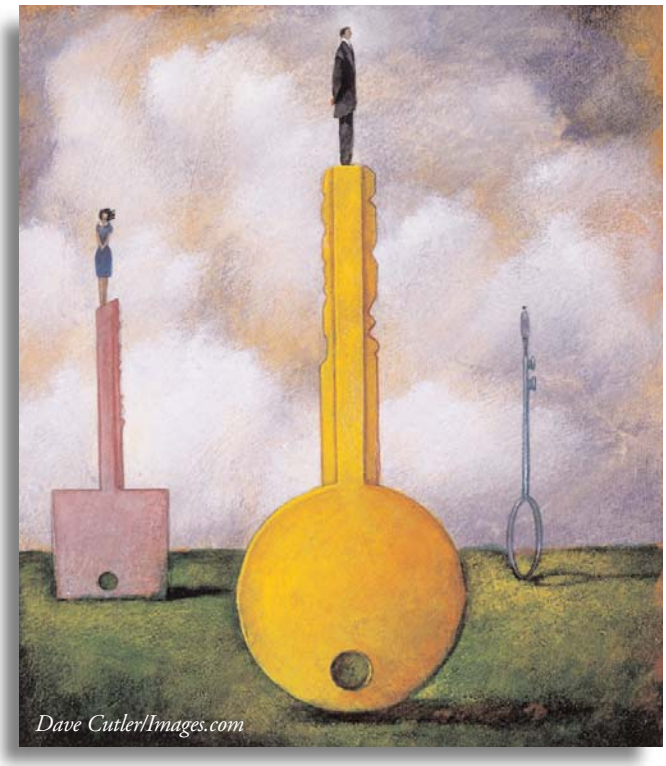
Access to Civil Justice in North Carolina

By Gene R. Nichol

The following submission is an opinion piece and the opinions expressed by the author are not necessarily those of the North Carolina State Bar. If you would like to submit an article expressing your viewpoint, please send an inquiry to the publisher.

One could be honestly heartened, even proud, of the North Carolina legal community's effort, over the last four years, in the cause of equal justice. I am.


Dave Cutler/Images.com

Chief Justice I. Beverly Lake established the North Carolina Equal Justice Commission in December 2005. His successor, Sarah Parker, has carried the commission's work forward with enthusiasm. A report, outlining the crush of unmet need, was drafted and completed in 2008.[1] It included an array of thoughtful recommendations designed to narrow the gap between our aspirations and practice. The North Carolina Bar Association, responding to the passionate leadership of Janet Ward Black, established its award-winning 4ALL program, expanding the delivery of pro bono legal advice and services.[2] The NC State Bar implemented a comprehensive mandatory IOLTA program.[3] The General Assembly helped with modest state increases earmarked to support access to civil justice. Others steps, in the academy, the bar, and on the bench, have followed. We have not, in short, been sitting on our hands.

Still, our story remains a familiar and worrisome one. Over 80% of the legal need of the poor and near poor in North Carolina, a cohort of at least three million Tar Heels, is unmet. Almost 15% of us live in stark poverty—a fifth of our state's kids. A full third of North Carolina households have combined incomes of under $25,000 a year.[4] Legal Aid of North Carolina turns away eight of ten actionable claims because they can't meet the demand. Many times that number never seek services in the first place. The poor are typically left unrepresented on the most compelling issues of life—divorce, child custody, domestic violence, housing, sustenance, health care, education, and subsistence services. As the ABA has documented, huge numbers of Americans "lose their families, their houses, their livelihoods, and like fundamental interests, as a result of the want of counsel."[5] And, of course, in the past 20 months, the harsh economic tide has hit us particularly hard. We've experienced, unsurprisingly, a crisis in home foreclosures. Our rates of unemployment and the uninsured have risen to among the highest in the nation. Reports indicate that "growing numbers of poor people swamp legal aid offices."[6] We carve "equal justice under law" on our court-

house walls, but the legal system we actually operate is powerfully, diametrically, and fundamentally at odds with what we say we believe. And, all told, we are likely only losing ground.

My purpose in this brief essay is to explore one corner of our response to the embarrassment of massively unequal access to justice—the decisions and obligations of our courts. It is true, no doubt, that the effective removal of the poor and near-poor from our civil adjudication—this flight from fairness—is the concern and responsibility of many. Lawyers, bar associations, law schools, faculties, legislators, citizens, activists, governors, and more, play their parts. But judges—state and federal—shoulder a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer. They determine, in actual and concrete ways, the measure of our constitutionally commanded notion of fairness—the "process" "due" in a regime of equal citizenship and dignity. They put flesh on the unfolding right to participate and be heard—without which a state's binding conflict resolution processes cannot be justified. In short, it is "uniquely the province of the judicial branch"[7] to gauge and ensure the essential fairness and integrity of its proceedings.

On this front, the constitutional command of meaningful access, North Carolina courts have behaved like almost all of their state and national colleagues. Sadly, that's not saying a lot. It's not saying enough. I'll try briefly to explain.

In a series of decisions from the 1950s, 60s, 70s, and early 80s, the United States Supreme Court recognized the growing tension between its burgeoning due process and equal protection mandates and the frequent *de facto* [and sometimes *de jure*] exclusion of the poor from the effective use of the civil justice system—procedures which meant that those unable to pay various fees, or purchase transcripts, or post expensive bonds, or, occasionally, afford counsel, could not be readily reconciled with either rights of meaningful participation or the equal citizenship of the impoverished. As a result, modest steps were taken, under the due process and equal protection clauses, to ensure more effective access to those unable to bear the costs of litigation.[8]

These developing patterns, though, were significantly curbed by the Burger Court in the mid-70s. They were then brought to an unceremonious halt a few years later in a case from North Carolina, *Lassiter v. Dept. of Social Services of Durham, NC*.[9] There, a closely-divided Court rejected an indigent's request for appointed counsel in an action brought by the state to terminate parental rights. Though conceding that the termination could "overwhelm an uncounseled parent," and that the private interests at stake were crucial, the Court announced the creation of a presumption against the recognition of a right to counsel if no loss of personal liberty is threatened. And *Lassiter's* presumption, in the succeeding three decades, has proven to be a potent one. Except for a small distinctive category of parental or reproductive cases, *Lassiter* deconstitutionalized the question of access to counsel in civil disputes.[10]

State courts, of course, have not been relegated, helplessly, to follow *Lassiter's* closed doors and knowing exclusion. *Lassiter* outlines only the floor demanded by the justices' tepid reading of the due process clause. States are free to do their own work—taking greater turns toward realism in enforcing their own constitutional provisions. If state judges are unsatisfied with standards that result in the marginalization of huge classes of litigants, they are given broader reign to actually demand meaningful access. But, broadly speaking, they have not done so.

States have, perhaps ironically, reacted strongly to the facts of *Lassiter*. A majority has moved, either by statute or state constitutional determination, to require counsel in termination or dependency and neglect proceedings[11]—though *Lassiter* didn't demand it. The reports are replete, as well, with cases exploring analogous parental or privacy-related interests. And decisions, unsurprisingly, give credence to actions—certain prisoner cases, contempt disputes, and civil commitment cases—that may threaten physical liberty.[12] What they haven't done, however, is apply searching scrutiny to the tension that occurs in the broad array of civil cases when indigents are denied meaningful access to a hearing because they can't afford a lawyer.

North Carolina's path is much the same. Though we grant counsel in a narrow array of *Lassiter*-like cases demanded by statute,[13] we have repeatedly denied, without serious scrutiny, claims to counsel in civil cases under the demands of due process and equal protection.[14] Unlike some states, we have refused to embrace a broader requirement for counsel

under our own state constitution than the federal courts demand.[15] As a result, the "age old problem" of "providing equal justice for rich and poor, weak and powerful alike"[16] has been removed from our constitutional agenda.

Our passivity leads to a bevy of fundamental problems.

The first is the most obvious one—huge numbers of poor and near poor North Carolinians are, in effect, turned away from the state adjudication system designed to resolve their legal disputes. What we characterize as "equal justice under law" is riddled with a massive exception, an undermining asterisk. Litigants, or potential ones, lose their effective ability to assert or protect various legal interests. The wounds can be tragic. We literally leave millions unrepresented—recognizing that the consequences may be more far-reaching, more devastating, and more permanent than many categories of criminal cases for which counsel is appointed. We recognize it, but then we put the lesson from our minds. We assume that near-total economic exclusion from a system of justice can be squared with fairness. It can't.

Second, in other circumstances, we've said so. As early as the 1930s, in the criminal context, the US Supreme Court declared, flatly, that "the right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel."[17] Even "the intelligent and educated layman … lacks the knowledge" successfully to represent himself. How much "truer is that of the ignorant and the illiterate?" Anyone "haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless one is provided."[18] This, the justices have said, seems "an obvious truth."[19] And "obvious" it remains—for civil as well as criminal disputes. The difference, apparently, is that in the civil justice system we are satisfied to ignore what is patently true. The inability to obtain counsel defeats, literally defeats, the constitutional call for a fair and meaningful hearing. But we choose to turn our gaze away from that irrefutable reality.

Third, other advanced western democracies—democracies that perhaps talk less about equality—far outpace us. The American Bar Association reports that "most European and Commonwealth countries have had a right to counsel in civil cases for decades." In rulings that bind over 40 nations and 400 million people, the European Court of Human Rights has determined that, at least in complex cases, indigents "fail to receive a fair hearing" unless represented by counsel at public expense.[20] Great Britain spends 16 times as much per capita on legal services for the poor as we do. New Zealand spends six times as much. Canada three. We advertise our commitment to equal justice more proudly, more vocally, than any other nation. We are seemingly satisfied with mere advertising.

Fourth, we aren't mere neutral umpires here. We have created, at the hands of the state, overarching tribunals for the resolution of private and public disputes. They are, at bottom, the only effective and ultimate means of finally resolving a massive array of civil controversies. We have, in turn, assured that these fora are hugely complicated, cumbersome, mysterious, professionally technical, adversarial, and expensive. Litigants are assigned the primary and costly tasks of discovering and asserting the controlling legal standards, marshalling the relevant facts, organizing them for presentation, offering them through convoluted rules of evidence, arguing compellingly before a jury, and appealing or sustaining the judgment. Pulling off these steps requires no small measure of experience, sweat, wit, and expertise. It is as far beyond the kin of most citizens as brain surgery is to me. That means, of course, that, without counsel, the door we have theoretically opened is, in fact, closed.

We could, perhaps, have done otherwise. Even now, it would be possible to dramatically simplify the rules and resolution methods for large swaths of disputes, making the use of lawyers unnecessary. Despite the challenges of access, we have chosen not to do so. Having followed this path, we can't now credibly claim that the decision to operate and subsidize a system that continually excludes so many citizens is merely neutral and unobjectionable. It is, rather, just that—a decision, a choice. One that cannot be squared with our stated constitutional aspirations.

My claim is not, inevitably, that North Carolinians enjoy the right to a lawyer in all civil cases. I call, instead, for the constitutional recognition that, in many disputes, the absence of counsel results in the effective denial of a meaningful opportunity to be heard. In the European system, for example, the provision of counsel is "determined by the particular facts and circumstances … the complexity of the case, and the applicant's capacity to represent himself effectively."[21] The focal point, though, should be whether it is realistic, or merely cynical, to assume that the judicial forum can be successfully navigated without the aid of counsel. And that determination is, at bottom, the responsibility of courts to enforce. More than any other institution, they are positioned to say that such rank exclusion cannot stand. Judges aren't immune from the huge chasm which exists between our asserted commitment to equal justice and the harsh reality of economic marginalization. Ultimately, they're responsible for it.

There would be a heartening irony were North Carolina courts to lead the nation in a quest to begin to make the promises of equal civil justice real. *Lassiter v. Department of Social Services of Durham*, the United States Supreme Court decision that did so much to remove the question of meaningful access from our constitutional agenda, was, as I mentioned, a North Carolina case. If we helped push the nation in so foundationally tragic a direction, we perhaps carry an added burden to aid in correcting the course. Our own constitution recognizes that a "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[22] That "recurrence" is long overdue. ■

Gene Nichol is a professor of law and director of the Center on Poverty, Work, and Opportunity at the University of North Carolina. *He would like to thank Jabeen Ahmad, Clay Turner, and Tarik Jallad for their strong research efforts on access to justice.*

Endnotes

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Judicial Independence

By Harry F. Tepker

In 2006, Justice Sandra Day O'Connor offered both a memory and a complaint: "Directing anger toward judges enjoys a long—if not exactly venerable—tradition in our nation." Perhaps, as one target for criticism, she should be forgiven for believing "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[1] It is a doubtful historical claim, but there is no doubt that the role of the federal judiciary in our democratic republic remains contested.

Still, mere debate is not a true threat to judicial independence, despite the occasional claims of some of the Court's defenders (including Justice O'Connor). But there is danger if America loses its memory. Some of our most revered political leaders launched attacks on an independent judiciary that were far more dangerous and potentially destabilizing to our constitutional system.

Judicial Independence, the Revolution, and the Constitution

Judicial independence does not require that politicians or citizens refrain from criticizing the courts. The "rage" perceived by Justice O'Connor is nothing more—and nothing less—than a manifestation of America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"—judges included.[2]

The dilemmas and paradoxes of the issue begin with the expectation that law must be the product of majority rule and ordinary political processes. Judges were not to be political. The role of judges was to expound and enforce the laws as given by legislatures and the people, but their discretion was presumed to be narrow and disinterested. If these expectations seem naïve today, it remains important to remember how central the ideas were to America's first ideas of constitutionalism.

John Adams believed the independence of the courts was an important factor in the case for American independence. A few months before Mr. Adams achieved his goal of a declaration of independence, he identified the issue as a central concern in the disputes between the colonies and the

British sovereign.

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.[3]

Mr. Adams had an exalted idea of what judges do and who they should be:

> The judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention.[4]

But he also had a narrow view of their function:

> Their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or in other words their commissions should be during good behavior, and their salaries ascertained and established by law.[5]

Judges were set apart from the political process and not dependent in their office on the political process, and immune—within limits—from reprisal by the political process.[6] Adams's point was affirmed by his friend and ally (at the time), Thomas Jefferson, in the Declaration of Independence. The king "has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.... He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

In many respects, there is little connection between the arguments made by colonials in defense of their decision to separate from Britain and the operative principles of government in their second constitution drafting effort. But article III, § 1 of the Constitution of the United States provides the basis—and the sum total—of constitutional principles regarding judicial independence: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior." Also, there was to be no reprisal by reducing compensation: The judges "shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[7] However, judicial independence came to be a broader concept and a matter of greater controversy.

An Early Battle over Judicial Independence and Impeachment

From the time that John Marshall began to transform the Supreme Court from "the least dangerous branch"[8] into the most powerful court the world has ever known, many Americans have complained of excessive judicial power. For many defenders of judicial review, independence means that court rulings must be treated as final and settled. Professor Larry D. Kramer offered important historical perspective to show that the constitutional guarantees of "independence" leave open many alternatives:

> What did earlier generations of Americans do? What did Jefferson, Jackson, Lincoln, the Reconstruction Congress, and Roosevelt do? The Constitution leaves countless political responses to an overly assertive court: Justices can be impeached, the court's budget can be slashed, the president can ignore its mandates, Congress can strip it of jurisdiction, or shrink its size, or pack it with new members, or give it burdensome new responsibilities, or revise its procedures. The means are available, and they have been used to great effect when necessary—used, we should note, not by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history.[9]

When the Constitution was ratified in 1788, many of its principles were only in the process of formation. Understandings were fluid. Most constitutional law courses begin with the idea that *Marbury v. Madison* clarified the role of the federal courts in the American system,[10] though even that cherished tradition finds resistance from academicians who cherish originality.[11] Even more important than Marshall's opinion was the political context surrounding the Court and the case. In truth, *Marbury* would have meant little had Thomas Jefferson torn the foundations of judicial independence apart, as indeed he tried to do.

After the outgoing Adams administration and the lame duck Congress (dominated by the Federalist Party) created and filled judicial offices for the party faithful, the Jefferson administration mounted a comprehensive assault on the judiciary. The Jeffersonians developed a series of arguments and proposals to undermine the federal judiciary. The judges were too political; they undermined majority rule; lifetime service permitted elitism, corruption, and aristocratic rule.

Congress enacted legislation stripping the lower federal courts of jurisdiction and the Court bowed deeply and deferentially to sustain the law.[12] The chief of the United States, John Marshall, was worried—most particularly by another element of the Jeffersonian assault, which was even more threatening to the future of the judiciary: impeachment and removal of federal judges.

The Jeffersonians targeted Samuel Chase, a signer of the Declaration of Independence who was appointed associate justice in 1796. He opposed ratification of the Constitution because it lacked a bill of rights. In an early decision, *Calder v. Bull*, he penned a defense of the power of the judiciary to enforce unwritten principles of natural law against the states—before the Marshall Court and *Marbury's* "establishment" of judicial review.[13]

Like many politicians of the day, Chase seemed to change his point of view and his political affiliations. Sometimes the only rhyme or reason to such changes seemed to be whether one liked Thomas Jefferson or not. Chase became an outspoken Federalist. He voiced his political opinions from the bench as part of instructions to juries; he injected his politics as dicta in his opinions; he bullied lawyers and litigants. And, when he presided at the trial of the notorious scandalmonger John Callender, he refused to allow the defense to submit legal and constitutional arguments against the infamous Sedition Law of 1798. He did not tone down his bitter partisan rhetoric during the election of 1800. He continued to blast President Jefferson for all his faults, real and imagined.

Led by "talented, if peculiar" Representative John Randolph of Virginia, the House alleged Chase had "behaved in an arbitrary, oppressive, and unjust way." He rendered "his legal interpretation on the law …before defense counsel had been heard." He was guilty of "political excess threatening to political institutions." In the

final article of impeachment, the House accused Justice Chase of conduct "tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan."[14]

The issues were sensational—and fundamental. Could a judge be impeached for expressing unpopular political opinions? Chase was accused of bullying lawyers and judges. Was such "misconduct" enough for removal? Judges were to serve for life, assuming good behavior. Did rulings at odds with legal principle add up to "high crimes or misdeamenors"? Could a judge be removed for bad behavior that was not criminal? The Constitution's text was ambiguous, as is so often the case. Two clauses were relevant: One spoke of judges holding office "for good behavior." The other spoke of impeachment and removal for "high crimes and misdeameanors."

Politics and the rule of law were in the balance. At the time the Senate took up the case against the Federalist justice, its members included 25 Jeffersonian Republicans and nine Federalists. A straight party-line vote would remove Chase. If a Republican majority removed Chase, perhaps the president could impeach other judges—including his cousin and adversary, John Marshall, chief justice of the United States. The great chief justice took the threat seriously. In addition to his attempt to sidestep dangers in *Marbury* and *Stuart*, Marshall proposed allowing unpopular Supreme Court rulings to be reversed by vote of Congress.[15]

Chase appeared before the Senate on January 4, 1805, to declare that he was being tried for his political convictions rather than for any real crime or misdemeanor. The presiding officer was the vice-president of the United States, Aaron Burr.

Burr has rarely been remembered as a hero. More frequently, he is described as villain, scoundrel, or opportunist. Washington, Adams, Jefferson, and Hamilton all distrusted him—a pattern not likely to help anyone's historical reputation. Only recently have a few histories and biographies attempted to rehabilitate his memory—with mixed results. But historians generally agree that at this moment of history, the vice-president did what politicians too often do not do. He did his job. He did his duty. The trial occupied the last weeks Burr served as vice-president.

Burr owed little to the president, who had shunned him. Burr had won an equal number of electoral votes in the election of 1800 (a party presidential elector cast two votes for president under the system of the day), but Burr, known to be candidate for vice-president, took his chances and allowed a Federalist-dominated, lame-duck House to consider him for the presidency. Jefferson considered his conduct a betrayal. Influenced by Alexander Hamilton, who chose his rival Jefferson over his enemy Burr, the House selected the Virginian after an extended impasse. Burr lost his party's support, and then he flirted with Federalists in an attempt to become governor of New York. But, his passionate foe, Hamilton intervened, and Burr again suffered defeat.

The Burr-Hamilton relationship deteriorated further after an exchange of correspondence. Eventually, Burr challenged Hamilton to the most famous duel in American history. The sitting vice-president shot and killed the former secretary of the Treasury in July of 1804.

Only a few months later, Burr assumed the chair of the Senate as a court of impeachment. He had been indicted by New York and New Jersey for murder. He stayed in the nation's capital, where he was immune to prosecution. But his political career was over, and he knew it. A Federalist newspaper observed of the Chase impeachment trial, "it was the practice of the courts of justice to arraign the murderer before the judge, but now we behold the judge arraigned before the murderer."[16]

Many senators hoped (or feared) Burr would cooperate and allow the majority to rush to judgment. But Burr gave Chase's lawyer, Luther Martin, the opportunity to present a complete defense. By all accounts, Burr set a good standard for decorum and fairness during the trial, though there was some complaint that the vice-president exercised too firm an influence on issues thought to be the province of senators.[17] Federalist senators had little hope that the murderer of their hero would serve justice, but as Senator Samuel Taggart, a Federalist from Massachusetts, observed later: "I could almost forgive Burr for any less crime than the blood of Hamilton for his decision, dignity, firmness, and impartiality...He is undoubtedly one of the best presiding officers I ever witnessed."[18]

Chase himself may not have been as enthusiastic in his description of the vice-president. He "unnerved Chase by interrupting when he saw fit, and Chase was reported later to have been on the verge of tears."[19] The vice-president shared the prevailing view that the associate justice was a "bully…. He had made it a habit to hector and badger defense attorneys; he made arbitrary and impulsive rulings; and he took punitive action against grand juries that refused to do his bidding."[20] But rather than cooperate in an effort to compromise the court's independence, "Burr decided to teach the bully a lesson."

Six Jeffersonian Republicans joined nine Federalists who voted not guilty on each article. The Senate on March 1, 1805, acquitted Samuel Chase on all counts. A majority voted guilty on three of the eight articles, but the votes for conviction on each article fell far short of the two-thirds required for conviction.

As the distinguished historian Charles Warren observed, the acquittal was an important event in the development of traditions of an independent judiciary. The Senate effectively insulated the judiciary from impeachment and removal based merely on disapproval of judges' rulings and opinions.[21] A chastened Chase resumed his duties on the bench, where he remained until his death in 1811. Thomas Jefferson was angry. Chief Justice Marshall was relieved.[22]

The Jeffersonian cry for controlling the federal judiciary was the first of many political outbursts threatening impeachment, removal, and retaliation for political reasons. In the 1960s, as noted by Justice O'Connor, "I can distinctly remember seeing lawns and highways across the country that featured signs demanding the impeachment of Chief Justice Earl Warren."[23] Justice William O. Douglas endured explicit threats of impeachment by future President Gerald R. Ford, even as one of his colleagues, Abe Fortas, was forced off the bench in the Nixon administration's efforts to create a Supreme Court more to its liking.[24] More recently, hated decisions of the Supreme Court on human rights issues, such as the abolition of capital punishment for juvenile crime, led to renewed calls for impeachment and removal of justices who had the temerity to read and cite the law of other nations defining basic human rights principles.[25]

Almost all of this rhetoric stung at justices who wanted to be liked and admired for their work, but in truth the arguments tended to be "sound and fury signifying nothing." The rule of law prospered, but only because Aaron Burr helped make sure that Thomas Jefferson failed in his vendetta.[26] ■

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Endnotes

1. *The Threat to Judicial Independence,* Wall Street Journal (September 27, 2006).
2. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
3. John Adams, *Thoughts on Government* (April 1776), reprinted in Philip B. Kurland and Ralph Lerner (ed.), *The Founders' Constitution* (1987), vol. 1, ch. 4, Document 5. (http://press-pubs.uchicago.edu/ founders/ documents/v1ch4s5.html).
4. *Id.*
5. *Id.*
6. Of course, Adams agreed judges could be impeached and removed for "misbehavior." *Id.*
7. These principles were the basis of a rare consensus between Adams, Jefferson, and their frequent adversary, Alexander Hamilton, who explained the Article III provisions:

   > The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

   Alexander Hamilton, The Federalist No. 78 (May 28, 1788).
8. *Id.*
9. *The People Themselves: Popular Constitutionalism and Judicial Review* 249 (2004).
10. Harry F. Tepker, Marbury's *Legacy of Judicial Review After Two Centuries*, 57 Okla. L. Rev. 127-42 (2004).
11. Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553, 554 (2003).
12. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (upholding the repealer act of 1802) ("Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.") Ironically, in *Marbury*, the chief justice had established the power of judicial review by holding "unconstitutional an act of undoubted validity," Leonard W. Levy, *Original Intent and The Framer's Constitution* 87-88 (1988), while subsequently upholding in *Stuart* as constitutional a law that was almost as certainly unconstitutional. *See also, e.g., Levinson* at 556 (describing *Stuart v. Laird* as "a far more significant capitulation by the Federalist majority to the determination of the Jeffersonians to escape the judicial handcuffs crafted by [the] Adams [administration]").
13. 3 U.S. (3 Dall.) 386. Justice Chase's arguments were rebutted—memorably and effectively—by the practical arguments offered by Justice James Iredell from North Carolina.
14. Isenberg at 274.
15. James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* 205 (2002).
16. *Id.* at 200.
17. Buckner F. Melton, Aaron Burr: *Conspiracy to Treason* 62-71 (2002) includes a balanced, short summary of the Chase proceedings in a book otherwise devoted to Burr's alleged plot to dismember the United States.
18. Isenberg at 275, 277.
19. *Id.* at 275-76.
20. *Id.* at 276.
21. Charles Warren, *The Supreme Court in United States History* 293 (1922).
22. Two years later, ironically, the central figures of the Chase impeachment became involved in another important case in the history of law and liberty. Jefferson pursued Aaron Burr: the former vice-president was tried for treason after an alleged conspiracy to create a new republican empire in the west. John Marshall presided. Luther Martin, Chase's attorney, became Burr's attorney. In a historic decision, the great chief justice insisted on a high legal standard for proof of treason, and Burr won acquittal from a jury. *See* Buckner F. Melton, Aaron Burr: *Conspiracy to Treason* (2002).
23. *The Threat to Judicial Independence*, Wall Street Journal (September 27, 2006).
24. For background on the efforts to remove Douglas and Fortas, see John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (2001).
25. Of course, the rhetoric of impeachment can be dark and threatening. For example, after a controversial decision abolishing the death penalty for juvenile crime, Phyllis Schlafly and Senator Tom Coburn of Oklahoma suggested that Justice Anthony Kennedy's invocation of foreign legal authority was just cause for impeachment. His use of "foreign law" was not "good behavior." Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, Washington Post, Apr. 9, 2005, at A3. Worse, at a Washington, DC, conference of conservative political activists, Dr. Edwin Vieria offered a recommendation, quoting Stalin: "No man, no problem." *Id.* ("The full Stalin quote . . . is 'Death solves all problems: no man, no problem.'"). Presumably, Vieria too was committed only to impeachment and removal, not something more violent. Yet, when so-called, self-described conservatives start quoting the darkest words of Joseph Stalin about appropriate political tactics, one ought to question what is truly "conservative."
26. *See* Joseph Wheelan, *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary* (2004).

Crossing Borders

By Sheryl Buske

On a blazing hot North Carolina afternoon in July, my research assistant Carol Fletcher (3L), my seven-year-old daughter Grace, and I set off for Arusha, the Tanzanian village at the base of Mt. Kilimanjaro where my daughter and I lived before moving to Charlotte. I was looking forward to continuing my work on children's issues and developing new relationships that will, hopefully, ripen into future opportunities for CharlotteLaw (CSL) faculty and students.

Sheryl Buske's seven-year-old daughter, Carol Fletcher, and Professor Buske on safari.

On a more personal level, for Grace and me, it was, in part, a journey back to our old home and the chance to reconnect with dear friends. Over the next month, we would travel to Tanzania and later on to South Africa, meet with lawyers and judges, both American and African, visit Tanzanian and South African law schools, meet with many, many organizations and non-government organizations (NGOs) working in children's rights, teach a CLE session on female genital mutilation (FGM), present at an international conference on Inter-Country Adoption, and even buy a goat and crash a wedding.

TANZANIA, EAST AFRICA

Three flights, three countries, and more than 24 hours after leaving Charlotte, we landed at the Kilimanjaro Airport about 9:00 at night. We descended off the airplane onto the tarmac in near complete darkness; but for the lights shining from inside the airport and the flashlights of the airport staff showing us the way inside, we would not have been able to see past our own hands. There are many things about Africa that simply can't be recreated anywhere else in the world. For me, the darker-than-dark that is an African night is one of those things.

The weariness that accompanies long-distance travel never ceases to evaporate when my feet hit the African ground. In a way that I can't explain, a knowing, a sureness that I am exactly where I am supposed to be settles over me every time I return. After claiming our bags (always a drama-laced half-hour watching as bags emerge from the belt one-by-one) and the obligatory stare down from the customs officials, we emerged through the doors to the chaos that is the arrival area. To mine and my daughter's great delight, our dear friend Ernest was there to meet us. I met Ernest years ago on one of my early trips to Tanzania when he was my driver. When we moved to Tanzania, much

of what I accomplished in the first few months, including renting and furnishing a house, having it fumigated for rats and snakes, having utilities connected, buying a car, and learning to drive there, was due to him.

The drive from Kilimanjaro Airport to the village of Arusha takes a couple of hours at night, roughly twice what it takes during the day. Several things necessitate extra time and caution at night: the absence of lights combined with the likihood of animals or people on the road, poor road conditions, and, although less of a problem in the last year due to increased police presence, the possibility of ambush by bandits. As we entered the edge of town, I was struck by how much it has changed in such a short time. New, big hotels were going up. Old hotels no longer exist. And one of the biggest surprises? A huge video screen has been installed at the clock tower roundabout, the main traffic circle in the village. Advertisements and short animal clips play during the day. When it was first installed, it was such a shock that it caused enormous traffic jams and car crashes. Now, the circle is lined throughout the day with people who stand and watch it for hours on end as if it were a movie theatre! That night, as we settled into our hotel, I couldn't help but think about the changes I could see around me and wonder about the ones I couldn't.

In Arusha at the UN's International Criminal Tribunal for the Rwandan Genocide.

UN International Criminal Tribunal for Rwanda

One of the reasons for being in Tanzania was to meet up with a group of Illinois Appellate and Supreme Court judges, lawyers, and physicians who had travelled to Tanzania as part of a CLE program sponsored by Global Alliance for Africa (GAA), a Chicago-based NGO that does amazing work with orphans and vulnerable children in Africa. I had been invited to teach a CLE course for the group later in the week, but on our first morning we met them at the UN International Criminal Tribunal for Rwanda. The tribunal was established in 1994 to prosecute those responsible for war crimes committed during the Rwandan genocide in 1994. After clearing security, we sat in and watched part of the trial of Dominique Ntawukulilyayo, the former sous-préfet in Butare Prefecture. He is charged with genocide, or alternatively, complexity in genocide as a result of his role in the massacre at Kabuye Hill, where 25,000 Tutsi were killed. According to the prosecution, Ntawukulilyayo ordered the Tutsi rounded up and killed on the hill after they had been told they would be protected. He's also charged with direct and public incitement of genocide as a result of his role in public demonstrations during which he gave instructions to "flush out and kill all remaining Tutsi who were in hiding."

After watching the trial for a bit, we had a private meeting with Charles Adeogun-Phillips, the senior trial attorney and lead prosecutor for the tribunal. He has been at the tribunal since its beginning and spoke with great candor and passion about the challenges the tribunal faces. Among those challenges is the difficulty in locating suspects, most of whom are no longer in Rwanda. Indeed, Dominique Ntawukulilyayo was apprehended in the French town of Carcassonne. Because the tribunal lacks jurisdiction over suspects outside of Rwanda, the UN must depend on the cooperation of member states. While it might seem that international cooperation with the tribunal could be expected, Mr. Adeogun-Phillips explained that many of the nations are politically "indifferent" to the prosecution of international war crimes. Some nations, African nations in particular, are torn between maintaining peace and pursuing justice. For some nations, the risk that cooperating in the prosecution of 15-year-old crimes could jeopardize newly achieved and relatively fragile peace by disturbing existing alliances is too high.

Another challenge is how the tribunal is perceived by Rwandans. Many Rwandans have mixed feelings about the tribunal. This is not surprising given their deep belief that the international community abandoned them during the genocide. Indeed, as the UN secretary-general acknowledged in 1994, the international community must share some of the responsibility for the genocide due to its failure to intervene quickly. Some have even suggested that Rwandans themselves are conflicted about the ongoing trials, torn between pursing justice through criminal accountability and moving past that to working towards national reconciliation. One result, according to Mr. Adeogun-Phillips, is that, today, many Rwandans have lost interest in the tribunal and have very little idea about what it is actually doing and are, for the most part, unaware of the convictions resulting from the prosecutions. He believes this is a critical failing of the tribunal. In his opinion, Rwandans must actually see the workings of the tribunal for justice to have any real meaning. Otherwise, the convictions are little more than hollow political victories unconnected to the true victims and their suffering. That is why, according to him, it was important that the Special Court for Sierra Leon be located in Freetown, in the country where the atrocities were committed.

The tribunal's presence and purpose are complicated issues. Some have questioned, even criticized, the millions of dollars the tribunal has cost and have argued that the money would have been better spent on social development programs in Rwanda. Others have criticized the slow pace at which the trials have moved. Even among the local Tanzanians in Arusha, the tribunal is controversial. Arusha has a long history of expat families; until the tribunal, most expats were missionary-based whose standard of living was not terribly different from the average Tanzanian. The arrival of

Left, the tent that Carol and Professor Buske (and her daughter) stayed in while in Tanzania. Below, Carol Fletcher with a Massai warrior.

the tribunal fundamentally changed the makeup of the expat community. Instead of missionary families of limited means who lived lives similar to Tanzanians, tribunal families arrived with their container shipments and a standard of living that was unrecognizable to most Tanzanians. The gap in the standard of living between the expat community and the local Tanzanians has gotten wider and wider. While the locals recognize that the tribunal directly and indirectly employees huge numbers of Tanzanians, they also point to the resentment over the gap between the wealthy expats and the local community as the reason behind the rise in violence and crime in the last few years.

The tribunal does cost an enormous amount of money. There are lots of people, including genocide survivors, who would rather the tribunal ended. There is also no doubt that its presence has forever changed Arusha from the small village it once was. Still, despite the cost and the problems, I believe the tribunal must continue. I've spent too many evenings over long dinners with friends from the tribunal and Joe, a quiet and dignified man whose machete scars are a constant reminder that he is the only member of his family to have survived the genocide, to believe otherwise.

Safari & CLE

No trip to Tanzania is complete without a safari. This time, we traveled with the GAA group to Tarangire National Park. We left Arusha early one morning and headed out across the Tanzanian plains. As Americans, in safari trucks with African drivers, we couldn't have signaled "TOURIST" any louder if we had tried. It wasn't surprising then when we were pulled over by the traffic police about 20 miles outside of Arusha. Given that the traffic police have no authority outside of town, it seemed a tad suspicious. In the end, though, it was just easier (as it usually is) to give a "gift" to the officers than return to town to debate their authority. Once on the road again, we passed the occasional Tanzanian walking along the road, groups of Massai herding goats and cattle, and patches of children who ran to the road to point, wave, and squeal with laughter as we passed them.

At the lodge where we'd spend the night, we were first welcomed and then warned about the animals that roam the property. We were told that while we were free to wander about on our own during the day, we had to be escorted by Massai warriors after dark. If you've ever watched documentaries about Africa, you've likely seen this tribe and know they have a great warrior tradition. They live in the grasslands between Kenya and Tanzania and are easily recognized by their bright clothing and beaded jewelry. They are extremely independent and have maintained their traditional lifestyles when most other tribes have gradually assimilated. Known for their honor and strength, they often work as "askaris" (guards). When we lived in Arusha, two brothers, Ngaranpusi and Joseffii, worked for us as guards. In their "shukas" (the bright cloth they wear wrapped around their waist and over their shoulder) and with spears and the ever-present machetes, they stood guard over us every night while we slept.

Tarangire, with volcanic mountains in the background, is known for the wide range of animals that roam through the 1,600 square miles due to the reliable water source of the Tarangire River. On that first afternoon, and the following morning, we saw more herds of zebras, elephants, giraffes, tiny dik-diks, and other animals than we could keep track of. Much to our excitement, many of the animals wandered within feet of the truck. Although I've been on many safaris, the magic of seeing such animals in such a magnificent setting never gets old.

That evening, before dinner, I taught a CLE session on FGM (female genital mutilation) for the GAA group. Because the group included attorneys and doctors, the discussion was fairly heated. There was a split among the group as to whether the more benign versions of FGM cause long-term health problems and, if they don't, whether advocacy around the issue is necessary or even appropriate.

Just when the discussion was getting really animated, it was time for dinner. Dinner was a spectacular bush dinner. A bush dinner is just that—dinner served in the bush. Our group was escorted by five or six Massai to the dinner spot and there were another five or six Massai where dinner was set up. Dinner was served at the edge of a cliff overlooking a huge valley.

Dinner was set up at a long table with linens, crystal, and china and lots of candles. We were treated to a fabulous three-course meal under the starry sky with animal sounds in the background and Massai warriors standing guard. It was a great night, full of great food, interesting people, and a little African magic. After dinner, a Massai warrior escorted us back to our tent. The jokes about wild animals in the dark were a little less funny then! We were so tired that we cleaned up and went straight to bed. We expected to sleep like the dead...but, instead, we listened to unknown animals roaming around and bumping up against the tent all night!

OVC: Orphans & Vulnerable Children

The primary reason for being in Tanzania was to continue my orphans and vulnerable (OVC) research and give Carol an opportunity to see how NGOs are working to improve the conditions for children in the Kilimanjaro region. OVCs are a large and diverse group. Some have lost one or both parents (in most parts of Africa, even children with one surviving parent are considered orphans), some are living with extended families, some are living in child-headed households, and some are surviving on the streets. My research has focused on the children who "live" on the street—those who spend all or part of their days on the street. Many of those "street children" have ended up on the street as a place of last resort; others have chosen the streets because it is better than the abusive conditions at home.

Arusha is a magnet for street kids in the Kilimanjaro region. They flock there from the rural areas for several reasons. First, as a larger town, it offers places to "disappear." More importantly, because of the high-end safari and Mt. Kilimanjaro tourist traffic that continually goes through Arusha, there are always tourists who can be depended on for spare change and odd jobs. Finally, word has gotten out that there are several well-respected NGOs who work with street kids.

The relationship between the street kids and the local police in Arusha is difficult. Time and time again, the police have conducted "round-ups" of street kids in which they have done sweeps and arrested as many as they could find, some as young as five-years-old. The sweeps were predicated on an old colonial-era law—the Undesirable Persons Act. As defined by the act, "undesirable persons" include "lunatics, prostitutes, and the homeless." Once arrested, the children were either beaten before they were released, placed in jail with adult offenders, or, sometimes, driven miles out into the plains and simply dumped out.

Carol and I visited some of the NGOs working with street children in the Kilimanjaro region. Some, like Amani (Kiswahili for "peace"), are residential centers which operate, in many ways, like a shelter. The children who live there have not been "placed" or "committed" there by any official authority. Instead, the children go there on their own and stay only as long as they wish. Amani never turns children away based on space, and the number of children varies from 70-100, ranging in ages from three to 17. Other NGOs, like Mkombozi (Kiswahili for "liberator"), provide direct services to fewer children and focus instead on advocacy and impact litigation. Recently, for example, in conjunction with the East Africa Law Society, Mkombozi challenged the round-ups, arguing that the Undesirable Persons Act violates not only the Tanzanian Constitution, but also the Convention on the Rights of the Child and the African Charter.

Carol Fletcher with children from SSOS Children's Village.

There are NGOs working with other OVCs as well. Cradle of Love is a baby home in Arusha. A baby home is short-term residential care for infants who can't be cared for by their families for a variety of reasons, primarily due to the death or poor health of the mother. In a country where baby formula is difficult to get and very expensive, infants who can't be breastfed often die. Baby homes address this specific need by taking in infants and toddlers until they are about two years old. Then, they are either returned to their families, moved to another orphanage, or, in rare cases, adopted.

There are other orphanages for older children as well. In all of Tanzania, there is only one "official" government orphanage. Called Kursini, it is located in Dar es Salaam and has a capacity of about 110 children. There are another 250 or so NGO-run orphanages scattered around the country, many of which are faith-based organizations that provide orphanage care for the majority of the children. Some of the orphanages, like the Green Door Home in Dar es Salaam, are small and care for less than ten children. Others, like SOS Children's Village, are very large and care for several hundred children.

We visited these places, and a few others, while we were in Tanzania. There are no easy answers here and there's some degree of controversy around most of the NGOs that work with vulnerable children. For example, some critics argue that NGOs that provide services to street children only encourage more and more children to run to the larger towns and cities. The baby homes are also controversial: critics argue that the money that is spent on baby homes could be better spent by supporting the families so that the infants could stay at home. Orphanages also have their share of critics who take the position that institutional care is never in a child's best interest.

Working on children's issues here sometimes makes me want to throw my hands in the air in frustration. If the truth be told, I have done that and more on occasion. But as frustrating as it can sometimes be, quitting is not an option.

Makumira University College, Faculty of Law

I was a visiting professor at Makumira's law school when we lived there and I was excited to introduce Carol to some of the Makumira students on this trip. We spent one morning at the law school, talking with my friend Dean Pallangyo and some of the students. It was interesting to watch Carol and the Makumira students compare their law school experiences and share their concerns about their futures. I think they found they have much in common, but I think Carol also came away with a new understanding of how much we take for granted with regard to education.

The UN has set universal primary school education as the second millennium development goal (MDG). While the Tanzanian government has made some progress in education, Tanzanian children continue to struggle to attend school. In 2002, Tanzania did away with school fees for primary school, making it, theoretically, free. Nonetheless, the "free" primary school education is still beyond the means of many average Tanzanians due to the inability of families to afford the cost of uniforms, lunch fees, and chalk fees (an administrative fee intended to cover the cost of supplies, including chalk). At the secondary level, there are even more challenges. Tanzania has the lowest secondary-school enrollment rates in sub-Sahara Africa. Less than 20% of primary school students who score well enough on exams to be eligible to attend secondary school actually do so. The low enrollment is attributed to the inability of families to afford school fees and the severe shortage of secondary schools. The shortage of secondary schools has resulted in extreme over crowding—in some schools the students-to-teachers ratio exceeds 70 -1. Given the obstacles students must overcome, the ones who make it to university are nothing short of remarkable.

In addition to the challenges faced by law students the world over, Tanzanian law students must also cope with the lack of resources. Unlike their American counterparts, Tanzanian students do without laptops, the internet, or their own books. Instead, they rely on the books in the law library, copying the material by hand. As I well remembered, and Carol discovered, the "law library" at Makumira is really just three shelves of books in the "main" library. Those three shelves are made up of casebooks from the US, UK, and parts of Africa, but very few from Tanzania. Recognizing this need and their ability to help, a group of CharlotteLaw students has taken on the task of raising money to purchase Tanzanian law books for Makumira students. More information about the project can be found at http://csllegallybound.blogspot.com.

After touring the school, including the classroom in which I once ended class early because a snake had gotten in a back window, Dean Pallangyo and a group of students joined Carol and me for lunch at a little local place near the school. They were full of questions, including why the divorce rate is so high in America, what we think about Iraq, and crime in America. Some of the liveliest discussion was around marital rape. The Tanzanian students were shocked to hear that American husbands can be charged with raping their wives. Such criminal charges are in stark contrast to Tanzanian law that permits either spouse to sue the other in civil court to enforce their right to sexual intercourse. It was a great day, in part because of the budding friendships between Carol and the Tanzanian students.

A Goat and a Wedding

One day we bought a goat and crashed a wedding. Buying the goat was an experience in itself. First, we picked up John, the goat-sitter. Then we drove out to a field on the edge of town and found a herd of goats being tended by a Massai. Ernest and John walked across the field and negotiated for the goat. We had given specific instructions about which goat we wanted—because it was going to have to ride inside the van with us, we wanted a CLEAN goat. Ernest, John-the-goat-sitter, and the Massai haggled over the price and we ultimately paid about $35USD for it. We watched as they tried to "herd" the animal across the field to the van. In the end, they simply picked it up and carried it. The bewildered animal was put into the back of the van, much to my daughter's delight, and off we went.

John-the-goat-sitter and the goat waited beside the road while we changed clothes at the hotel. We hadn't planned to attend a wedding and hadn't packed appropriate clothes, but Ernest swore we didn't have to dress up, so we didn't. Between Carol and me, one of us was dressed alright and the other was in jeans and gym shoes. Even so, we convinced ourselves it would be fine—until we saw the other guests. We were ridiculously underdressed...and we had a goat.

The Tanzanians were naturally curious about who we were and what we were doing there (whether we were, in fact, officially invited was still not clear), but they were incredibly kind and welcoming. We were seated in the front row in seats of honor, we were welcomed into the dancing, and assigned our own babysitter to translate and look out for us. At the reception, there were the usual toasts and speeches followed by dinner. The big event followed dinner: the gifting. The bride and groom and their families formed a receiving line and everyone went through it and gave the couple their gifts. We were at the very end of the line. Giving a goat as a wedding gift is a "big deal." Carol, Grace, and I (and the goat) were announced and joined by the bride's sister. We then proceeded down the main aisle, singing, dancing, and clapping the whole way until the end when we presented the couple with the goat-on-a-rope.

We were never sure whether we were actually invited to the wedding. Although Ernest swore we were, the bride certainly seemed surprised to see us. Even though our invitation was questionable and we were underdressed, the Tanzanians made us feel as if we had somehow honored them with our presence.

I'm sometimes asked why I spend so much time in Tanzania. I've always had a hard time describing the pull it has on me. Years ago I fell in love with the place, with the people, and with the opportunity to really use my legal education to help improve the lives of children. There is great need there. But there is also an amazing thing happening—committed, creative, and compassionate people from many disciplines are taking the best of what they know from where they come and are creating child welfare systems from scratch. It's a fascinating process and, while I am privileged to have some small part in it, the truth is I need Tanzania's children more than they need me.

SOUTH AFRICA

Too soon it was time to leave Arusha, and Ernest drove us back to the Kilimanjaro Airport for our flight to Bloemfontein, South Africa. I was full of mixed feelings during the ride to the airport. I was looking forward to the next phase of our trip, but leaving Arusha is always hard for me because it makes me hyper-aware of the privileged life I lead. I know that Ernest and his wife Ava have the same hopes and dreams for their daughter as I do for my mine. And, while I also know that much of what my daughter ultimately achieves will be determined in a large part by what she wants and how hard she works, I know the same is not true for Ernest's daugh-

ter. The unfairness of this weighs on me every time I leave Tanzania.

University of the Free State, Faculty of Law

Charlotte School of Law and University of the Free State, Faculty of Law (UFS) are forging a new relationship that will result in future collaborative projects for CharlotteLaw and UFS faculty and students. UFS showed itself to be a grand host, filling our days with opportunities to guest lecture at the school, present at an international conference on adoption, and to spend a significant amount of time in the community with a variety of children's NGOs. I was delighted to have the opportunity to guest lecture in several law school classes, in both clinical and substantive courses. Legal education in South Africa follows a British model in that law school is an undergraduate program instead of graduate school and the students are, therefore, generally younger than their American counterparts. Despite those differences, I found the UFS students to be engaged and more than a little curious about our legal system. Most surprising, however, was the discovery of their well-developed opinions about our criminal justice system. The right to a (criminal) trial by a jury of one's peers is one of our oldest individual liberties, developed in response to attempts by the British to deny American colonists fair trials. While the jury process itself has had a spotted history, with a few blemishes along the way, it is generally perceived to be essential to a just system. Not so to the UFS students—they were surprisingly vocal about their belief that criminal defendants cannot get a fair trial in a jury system and that it should be abolished. They also found our dual system of federal and state government to be confusing and unnecessary. They found it extraordinary that someone could face both federal and state prosecution from a single event. We, on the other hand, found it equally surprising that South Africa has a special Court of Equity which hears cases and permits plaintiffs to recover for ordinary insults. Essentially, name calling and the like that does not rise to the level of a tort is still actionable.

We also spent a great deal of time outside the classroom with UFS faculty and students. On one of our last nights in Bloemfontein, one of the UFS professors invited us, along with other UFS faculty and a few students, to her home for a traditional South African brie (a barbeque dinner). As is the way with dinner parties, the conversation was wide-ranging, skipping across a variety of topics, ultimately landing on higher education in South Africa post-apartheid. With the exception of Carol and me, everyone else was South African and had lived there their entire lives. The differences in their age, gender, and race, however, gave them all very different perspectives about what legal education should look like and what it should be trying to accomplish. For starters, there was debate about in what language(s) classes should be conducted. On the one hand, the official language of the court system is English. On the other hand, a significant percentage of the South African population does not speak English. This has lead UFS to require all professors to teach every class twice: once in English and then again in Afrikaans. It also appears that UFS will require a third language in the near future. The bigger debate was around how to create and maintain a rigorous and demanding legal education in the current circumstances. The primary and secondary education in South Africa, like Tanzania, is severely lacking in many respects—rural schools in particular are overcrowded, underfunded, and lack basic necessities such as books and paper. Additionally, because of current government policies which tie school funding to graduation rates, primary and secondary schools have an incentive to promote and graduate students even if they are not performing at grade level. Furthermore, due to the grade inflation combined with the absence of any "leveling-factor" such as an LSAT score, universities find themselves with incoming classes of students who are performing at wildly different levels...and in different languages. On top of all this sits race relations in South Africa post-apartheid. It is much more complex than I imagined.

Inter-Country Conference on Adoption

The statistics on AIDS and orphans in Africa are staggering. UNICEF estimates that there are more than two million orphans in South Africa alone. The traditional safety nets of extended families and community services are stretched to the point of breaking and can no longer keep up with the number of orphaned children. Like other countries hit hard by the HIV/AIDS pandemic, South Africa is forced to come up with new responses to the growing numbers of orphans. One response is to recognize and provide support for child-headed households—households in which the oldest child, rarely over the age of 12, functions as the "head" of a household made up of children. Another response is to actively pursue adoption, specifically inter-country adoption, as an option for children in need of a family.

Some African countries, such as Ethiopia, have embraced inter-country adoption as a permanency option. South Africa, on the other hand, has not done so despite there being no express prohibition against children being adopted by residents of another country. Two explanations are offered: 1) as a practical matter, South African adoption agencies are not equipped to take on the logistical aspects, such as post-adoption follow-up, necessary to ensure good placements; and 2) there is a cultural reluctance of most South Africans to permit, much less actively encourage, the removal of a South African child from South Africa to be raised in another culture, even another African culture.

This reluctance is sometimes hard for Americans to understand. To many Americans, and others, that a child needs and deserves a home with a loving family is more important than debates about taking children from their "culture." On the flip side, many, many people feel strongly that a cultural identity is so important that it outweighs whatever other "benefits" adoption could provide. Indeed, these are the very concerns that lead to our own Indian Child Welfare Act (ICWA). Concerned that Native American children were being removed in large numbers from Native American families and communities, child advocates lobbied for the passage of ICWA, which created certain presumptions and procedures in favor of Native American children remaining within their communities.

We heard the "cultural concerns" expressed over and over at the inter-country conference on adoption at which we were invited speakers. One man in particular stands out in my mind. He was not South African, but he acknowledged that his country struggles with a growing number of orphans as well. Nonetheless, he opposed inter-country adoption as a permanency option. As he so eloquently explained, because civil war, famine, and the AIDS epidemic have robbed his country of an entire generation, they cannot afford to lose more of their people, particularly their children. As a mother, and more specifically as an adoptive mother, I wrestle with this issue all of the time, but ultimately find myself in agreement with UNICEF's position.

The Convention on the Rights of the Child (CRC), which guides UNICEF's work and

was unanimously adopted by the United Nations in 1989, incorporates the full range of children's human rights into a single document. With regard to inter-country adoption, Article 21 of the CRC recognizes that inter-country adoption may be considered if a child cannot be properly cared for in their country of origin. This reflects what I tend to think of as "up-river" and "down-river" interventions. "Up-river" interventions are those early interventions which address problems and may make later drastic measures unnecessary. For example, the creation of support networks such the Go-Go Getters ("gogo" is Zulu for grandmother), groups of South African grandmothers who come together to learn from and support each other in their roles as caretakers to their orphaned grandchildren, provide resources and support to grandmothers, which in turn makes it possible for them to continue to care for their grandchildren. Adoption, on the other hand, is an example of a "down-river" intervention and should only be used in extreme cases. To be sure, in countries battling growing numbers of orphans, extreme cases may be common. I have no quarrel with inter-country adoption and I believe it is a valid option, perhaps the only option, in many cases. Going forward, however, I do believe that the international community must do more to support the children "up-river" and not default to "down-river" inter-country adoptions as the preferred option for children who cannot be cared for by their parents.

Child Welfare

We visited a wide range of children's NGOs and organizations in South Africa, including private adoption agencies, domestic violence shelters, after-school programs, orphanages, facilities for street kids, juvenile justice programs, and hospice care facilities. I was immediately struck by how different things are in Bloemfontein from Arusha, even taking into account Bloemfontein is a much larger city than Arusha and South Africa's greater resources. One of the most notable differences was the "invisibility" of the street kids in Bloemfontein. There's hardly a place a person can go, local and tourist alike, in Arusha where street kids aren't visible standing in front of shops, sleeping in open areas, and hustling everyone who passes for spare change. In Bloemfontein they were considerably less visible. This was surprising, especially as local NGOs told us that, unlike the Arusha police, the Bloemfontein police have very good working relationships with street kids and advocacy organizations.

Another difference was the degree of specialized child welfare services. In Tanzania, few NGOs are specialized and instead attempt to provide whatever services are needed. In Bloemfontein, most NGOs seemed to provide specialized services for specific needs. For example, we met with one organization that prepares child victims to testify in court but otherwise has no involvement with the child. It is likely that this specialization results in better services being provided to children; however, it also creates a system that is difficult to navigate because it isn't always clear which organization or NGO has the primary responsibility in any given situation.

This difficulty in identifying the appropriate organization became clear to us when we were approached for assistance by the family who ran the guesthouse where we stayed. One afternoon we returned to the guesthouse and it was clear the family was very upset. They told us that "Mary," the woman who had worked for them for the last 15 years and who they felt was family, had been arrested. Mary is the guardian to a young girl who had been assaulted. Mary was to testify, but due to a miscommunication with the police, she failed to appear in court. Later that afternoon, the police arrested her in front of the girl and the frightened girl ran away. We wanted to help but weren't sure who to contact. In the end, we contacted several UFS faculty members and some of the people at the various organizations we had met. Everyone responded immediately and it was rewarding to be able to put our friends in touch with people who could help them and who understood the system.

Conclusion

Over this past summer, Carol, my daughter, and I travelled through Tanzania and South Africa. Much of what we saw and experienced was familiar, but there were some surprises, too. One of the things that doesn't change is the astonishing beauty alongside palpable ugliness. Another constant is irrepressible joy and kindness amongst great deprivation and need. It is the beauty, joy, and kindness that found me years ago and the reason I will always return there. ■

Professor Sheryl Buske teaches in the area of children's human rights at the Charlotte School of Law. She and her daughter relocated to Charlotte from Tanzania in August 2008. Professor Buske and Carol's blog about their trip is located at: http://charlottelawinafrica.wordpress.com/page/2. She'll be returning to South Africa in early October with two CharlotteLaw students to compete in an International Moot Court Competition. She can be reached at sbuske@charlottelaw.edu.

Endnotes

1. That it is, indeed, a small world never ceases to amaze me. Among the group of judges and lawyers from the GAA group was a woman I had met many years ago and a young man I would not have recognized had I not known who he was. Years ago, as a brand new lawyer just out of law school, I worked for the state foster care agency. I was assigned to a case which generated significant public attention, in part, because it involved foster parents who were prominent lawyers and allegations of racial discrimination. Standing before me that morning was the former foster mother (now guardian) and the young man who had once been a toddler in my office. He has grown into an admirable young man in a family that loves him deeply. Just as I once imagined.
2. For more information about Global Alliance for Africa, see their website at www.globalallianceafrica.org.
3. Report of the secretary-general on the situation in Rwanda, Doc. S/1994/640 (1994), para. 43.
4. To date, only 45 cases have been completed since the tribunal was established. ICTR Detainees Status - July 14, 2009 at www.ictr.org/default.htm.
5. For more information about Amani, please see their website at www.amanikids.org.
6. For more information about Mkombozi, their work, and their lawsuit, please see their website at www.mkombozi.org.
7. For more information about Cradle of Love, please see their website at www.cradleoflove.com.
8. For more information about the Green Door Home and the Boona Baana Center for Children's Rights, go to www.boonabaana.org/green_door_home.htm.
9. SOS Children's Village is a worldwide organization and operates children's homes all over the world. For more information, please see their website at www.soschildrensvillages.org.uk/sponsor-a-child/africa-child-sponsorship/tanzania.htm.
10. Makumira is located in Usa River, about 15 miles outside of Arusha. The college is part of Tumaini University - the national university for the Evangelical Lutheran Church in Tanzania. For more information, see their website at www.makumira.ac.tz/home.html.
11. Lewin, Keith, *Strategies for Sustainable Financing of Secondary Education in Sub-Sahara Africa*, World Bank Working Paper No. 136.
12. For more information about the law school, please see their website at www.uovs.ac.za/faculties/index.php?FCode=03.
13. www.unicef.org/southafrica/reallives_4265.html.
14. Convention on the Rights of the Child, Article 21.
15. I think the "up-river" and "down-river" metaphor comes from a parable about children drowning in a river. The story is about an entire village of people who rush to the river's edge to rescue drowning children as they float down the river. One man refuses to help. As he is walking away, a second man asks how he can abandon the drowning children. The first man answers that instead of pulling them from them river, he is going up-river to prevent them from falling in in the first place.

A Tribute to Robinson O. Everett, North Carolina's Citizen Lawyer

By James C. Dever III

George Wythe was a lawyer and one of seven Virginians who signed the Declaration of Independence. Wythe also served as a delegate to the Constitutional Convention, mayor of Williamsburg, speaker of the Virginia House of Delegates, a judge of the Chancery Court of Virginia, and the first law professor in the US.

Wythe's students included John Marshall, Thomas Jefferson, and James Madison. To many in the legal profession, George Wythe epitomizes the phrase "citizen lawyer." On June 12, 2009, North Carolina lost its version of George Wythe when Robinson O. Everett died at age 81. As one of Everett's former students, colleagues, and friends, I was privileged to work with this exceptional teacher, scholar, military officer, judge, lawyer, entrepreneur, family man, and citizen. He had a towering intellect, indomitable energy, and disarming humility. He was North Carolina's quintessential citizen lawyer.

Robinson Oscar Everett was the only child of two prominent North Carolina attorneys: Kathrine Robinson Everett and Reuben Oscar Everett. Kathrine Robinson Everett was a pioneering lawyer, who graduated first in her class in 1920 from the University of North Carolina School of Law and received the highest score on the 1920 North Carolina bar examination. After graduating, Kathrine Robinson began practicing law with her father in Fayetteville, North Carolina. In 1924, Kathrine Robinson met Reuben Oscar Everett at a meeting of the North Carolina Bar Association. At the time, Reuben Oscar Everett was a prominent trial lawyer in Durham. In 1926, Kathrine Robinson married Reuben Everett, and they began practicing law together in Durham. Robinson

Everett arrived on March 18, 1928.

As a child, Robinson Everett excelled at everything that he attempted, particularly academics. At age 15, he graduated from Durham High School. He then took statewide examinations in four subjects: mathematics, Latin, history, and physics. He was competing against all North Carolina high school seniors and received the highest score in the state in mathematics, Latin, and history, and the second-highest score in physics. Because Robinson was only 15 when he graduated from high school, he then attended Phillips Exeter Academy for one year, where he continued to excel academically. At age 16, after a summer studying at the University of North Carolina, Robinson Everett enrolled at Harvard University. In 1947, at age 19, he received his AB in Government *magna cum laude* from Harvard. While at Harvard, he also played on the basketball team and was elected to Phi Beta Kappa.

In the spring of his senior year, Everett was accepted at Harvard Law School. In 1950, at age 22, Everett graduated from Harvard Law School and received his L.L.B. *magna cum laude*. He ranked fourth in a class of 455 students and was an editor of the *Harvard Law Review*.

After graduation, Robinson Everett returned to Durham, passed the North Carolina bar exam, and began practicing law with his parents. The firm was renamed "Everett, Everett, and Everett," although Robinson referred to the firm as "Mother, Dad, and Me." In 1950, Robinson Everett also joined the faculty at Duke Law School. Only age 22 at the time, he remains the youngest person ever appointed to the Duke Law School faculty.

In 1951, in the midst of the Korean War, Everett volunteered and enlisted in the United States Air Force as a private. He served on active duty for two years in the

What Judge Robinson O. Everett Taught Me About Being a Lawyer

NATHAN S. CHAPMAN

The first lawyer I worked for was perhaps the best one I'll ever know. I had just finished a year at Duke Divinity School and was preparing for my first year at the law school when a friend suggested I ask Robinson Everett about a summer job. I told Judge Everett that my kin were all preachers and teachers, and that I was not convinced I was a good fit for law school. He said, "I'm not sure why, but it seems like the right thing for you to work for me this summer." We agreed he would pay me $3,000 for the whole summer—just enough to persuade my wife I didn't need a second job. In retrospect, I've never been more overpaid. By summer's end, Judge Everett had shown me more about serving a community as a lawyer than I could learn in a lifetime of scholarship. A few stories in particular bear repeating.

Lesson I—Judge Everett had a church friend who periodically consulted him on legal matters. One day he called the Judge, fit to be tied about a property dispute with his neighbor. The Judge let me sit in on their meeting. The Judge patiently listened to the client's story. While landscaping his yard, the client had cleared a large, unsightly, 100-year-old live oak. The trouble was this: the tree was in his neighbor's yard. The neighbor had not taken the news well. He pitched a fit, hired a surveyor, and threatened to sue. The surveyor confirmed that the tree had, in fact, been in the neighbor's yard, and now the client was ready to fight a lawsuit on the ground that tearing down the tree was an aesthetic improvement. Mostly, I think, he was just mad at his neighbor's response, ashamed at his own mistake, and a bit too proud to make amends.

Judge Everett's first question was, "Have you talked to John?" The client looked down and muttered something like, "Why would I talk to John?" It became apparent from the ensuing conversation that John was the Judge's and the client's pastor. I'm not sure what John would have said to the client, but based on the client's response, I think he did. So after about 45 minutes of background facts that had been punctuated by unreasonable vitriol and self-serving gloss, it took only one question and a couple of minutes of conversation before the client was prepared to move on—to confirm the property line, to pay for the tree, and to help his neighbor build a fence.

The meeting taught me a few lessons about a lawyer's role. First, a lawyer can often do the most good by encouraging a client to mend a relationship, if possible, rather than exacerbate a conflict by turning it into a legal dispute. This takes patience, tact, and helping the client to remember the big picture. In this case, it took reminding the client that he had responsibilities (to his neighbor) and a community (his church) that called him—and gave him the necessary support—to let go of his pride. Indeed, lawyers do well to remember that clients are more than the sum of their legal claims. They have itches that money can't scratch, and they have an array of vices and virtues. A wise legal counselor steers them in the direction of their virtues and encourages them to a better life, not just a better legal position—one that puts forgiveness, responsibility, and hard work into operation with justice.

Lesson II—By that summer, the sun was setting on Judge Everett's career, but his prodigious advocacy skills were still apparent. Though he was prone to nap through meetings, and though he kept an enviable pace for a 77-year-old, he was not at full steam. Still, he was a picture of southern bonhomie, and behind his warm, ever-present smile, his mind was a polished diamond. He could go from Matlock to Oliver Wendell Holmes in a Carolina second. For instance, upon receiving a call from a reporter on point of military law, he instantly recalled the relevant code sections and case names, quoting passages from memory.

His mind shone brightest, though, in court. We spent much of the summer preparing a client's auto collision claim for trial. Our liability claim was strong, but the insurance company dragged its feet on a settlement, in part because it doubted our dam-

Judge Advocate General Department in Washington, DC. Following his release from active duty, Robinson remained in the air force reserve. In April 1978, he retired as a colonel in the Judge Advocate General Corps.

After completing his tour on active duty, Everett returned to Durham and resumed practicing law with his parents. Initially, he also taught part-time at Duke Law School. In 1956, he published the textbook *Military Justice in the Armed Forces* and was immediately recognized as one of the nation's leading scholars on military justice.

In 1957, Robinson Everett accepted a full-time appointment to the faculty at Duke Law School. Not content simply to teach, he received an L.L.M. degree from Duke Law School in 1959. In 1967, Duke Law School awarded him tenure. From 1957 until his death in June 2009, Robinson Everett taught continuously at Duke Law School. He taught criminal law, criminal procedure, national security law, military justice, sentencing, and land use planning. As Dean David F. Levi of Duke Law School has noted, Robinson Everett taught over 97% of all living Duke Law School alumni. Dean Levi accurately observed that, "For so many Duke Law alumni, Robinson Everett is Duke Law School."

While a professor at Duke Law School, Everett published articles on criminal law, criminal procedure, military law, national security law, academic freedom, appellate advocacy, election law, government contract law, redistricting, real estate law, radio and television law, and secured transactions. Additionally, while on the faculty, Everett served (at times) as the faculty advisor to the *Duke Law Journal, Law & Contemporary Problems,* and the Moot Court Board. He also served on countless law school and university

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ages and in part, I suspect, because they wondered how much Judge Everett had left in the tank. The case made it as far as a pretrial hearing, my first experience in court. When the court asked for opening remarks, Judge Everett slowly rose. His voice, as if by a conjurer's trick, instantly grew to fit the large courtroom. Without a jot of notes or a wasted word, he methodically laid out the plaintiff's case. That was the first time I experienced the beauty and power of a legal argument expertly presented. And Judge Everett was a master. Within an hour we were toasting a favorable settlement with sweet tea and hushpuppies.

I learned that the goals of serving the court and serving a client are indistinguishable. Nothing is more helpful to the court or to a client's case than the sort of clarity, precision, and brevity that only diligent preparation and honesty can offer.

Lesson III—I wasn't the only one working with Judge Everett that summer. He was surrounded by a cast of characters only real life could bring together: (1) a middle-aged, second-career Duke Law grad who practiced real estate and elder law part-time; (2) a newly-minted Carolina grad trying to scrape together an education law practice; and (3) a middle-aged attorney who worked largely from his home in Greensboro after an illness had ended a promising DC career. They each worked out of the Judge's offices (I don't know if they paid rent), and traded on the Judge's good name.

Only the third lawyer could be said to be working for the Judge, and so I had the privilege of working some with him. I'll never know what sort of lawyer he was in his youth, but in his illness he was a challenge to work with. He had great difficulty focusing for even short periods, was prone to debilitating exasperation over minor errors while seemingly unaffected by significant problems, repeated himself ad nauseam, and in general was unburdened by basic communication skills. He was, by any reasonable estimate, more of a liability than an asset. And he knew it. Even though he grew impatient and frustrated with his own disabilities, he had the strength to be honest about himself and generous with others. In this regard he is one of the most inspiring people I've known. But that didn't make him easy to work with. Judge Everett patiently made time and space for his idiosyncrasies, found opportunities to laugh with him, and, perhaps most importantly, gave him work. He treated him as a person and not a liability.

Most of Judge Everett's colleagues had a story to tell of how he had thrown them a lifeline at a moment of vulnerability. I don't know what he was like as a younger man, but I know that, at the apex of a profession that all too often sees leverage as greatness and networking as friendship, Judge Everett consistently put his time, money, and reputation on the line to remove hindrances for those who could not possibly repay him and whose association would have been perceived by many to threaten their career and credibility. He thus demonstrated that there is no sphere, public or private, professional or leisure, that kindness and generosity cannot invade—and reform—if one is only willing to make the extra effort and run the risk. Those sorts of commitments might not make much sense to "the market"—meeting human need is rarely efficient as economists use the term—but it's hard to see how taking the time and energy to care for colleagues wouldn't make our communities stronger and our legal system healthier.

Lesson IV—That summer Judge Everett became the second recipient of the North Carolina Bar Association's Judge John J. Parker Memorial Award, a lifetime achievement award. Even I, in my ignorance, realized that it was a pretty big deal. At some point he brought the award into the office, but I don't know what happened to it after that. He didn't make much of it. The Apostle Paul admonishes Christians to evaluate their lives with sober judgment, to not make too little or too much of themselves. I've seen a lot of folks minimize their accomplishments out of feigned humility, or because they are convinced that nothing could ever be good enough. Other folks deny themselves enjoyment of their successes as self-punishment for some private failure. Maybe Judge Everett fell into one of those categories, but I don't think so. Instead, if you listened to those who loved him and those whose lives had been touched by him, it became clear that the sort of life's work that merits the Judge Parker award is its own reward—especially when, like Judge Everett, you've got the humility and good sense to enjoy the ride. ■

Nathan Chapman graduated from Duke University School of Law and Duke Divinity School in 2007. After law school, he clerked for Judge Gerald B. Tjoflat (11th Circuit Court of Appeals), another great lawyer. He now practices law with Wilmer Hale in Washington, DC.

committees. During his teaching career, Everett also found time to teach seminars at the University of North Carolina School of Law and the Wake Forest School of Law.

As a teacher, Robinson Everett was the antithesis of the fictional character Professor Kingsfield from the *Paper Chase*. He was not only clear and kind with students in class, but also generous with students outside of class. He never seemed to be in a hurry and always took time to answer questions and give encouragement. He knew all of his students by name and frequently ate dinner with his students in his home or at Bullock's Bar-B-Cue. Moreover, he remained friends with numerous students long after they graduated. Indeed, one former student described walking with Everett from the Duke Law School to Cameron Indoor Stadium to attend a basketball game. The former student noted that everyone at Duke seemed to know Professor Everett and everyone wanted to stop and speak with him. He was a role model who revealed—in how he lived his life—that a person could be both a great teacher and a great person.

I graduated from Duke Law School in 1987. While a student, I saw first hand Everett's excellence as a teacher. He knew and explained both the theoretical and the practical. Like many other students, I also had dinner with Robinson at his home with his family. Following graduation and a federal clerkship, I remained in touch with him while serving on active duty in the air force at the Pentagon. As my time on active duty was ending, I spoke with Robinson about my desire to return to North Carolina. He immediately prepared a list of firms and contact information identifying a "former student" at each firm. As it happened, each "former student" happened to be the managing partner or on the management committee at each firm. As a result of Everett's counsel, I joined Maupin Taylor & Ellis in Raleigh in 1992.

Robinson was kind enough to speak at my investiture as a United States District Judge in 2005. Ever the southern gentlemen, he wrote me a note after the ceremony thanking me for inviting him to attend and wishing me all the best in my judicial service. Classic Robinson Everett. He does me a favor and then says thank you.

In 2008, we taught a seminar together at Duke Law School on sentencing and punishment, and in 2009 we taught criminal procedure together. Robinson loved preparing for class and teaching. At the end of each course, we would walk back to his office. He always wanted to discuss how we could improve "the next class." This attitude reflected his perpetual quest to look forward and to seek improvement in all that he did.

Everett did not limit his service to teaching. From 1961 to 1964 he served as counsel to the Subcommittee on Constitutional Rights of the United States Senate Judiciary Committee and continued to consult with the committee from 1964 to 1966. Working with Senator Sam Ervin, Everett helped to craft the Military Justice Act of 1968, which created the position of military judge and modernized the military justice system.

In 1980, President Carter appointed Everett as chief judge of the Court of Military Appeals. He served as chief judge for ten years, as an active judge for two years thereafter, and as a senior judge until his death. As a judge, Everett wrote judicial opinions on all aspects of military justice. His colleagues on the court (which is now known as the United States Court of Appeals for the Armed Forces) speak glowingly about Robinson's tenure as chief judge and his subsequent service. He loved serving as a judge. In a conversation that we had two days before his death, Robinson described his excitement at a case that he planned to hear as a senior judge in late June. He already had read the briefs and the record and said that he had "a few questions" for the lawyers. As advocates who appeared in his court knew, Judge Everett always got to the heart of a case at the outset of oral argument with "a few questions."

While serving as a judge, Everett often saw cases at the intersection of the Constitution and national security. As a result, in 1993, he founded the Center of Law, Ethics, and National Security at Duke Law School and recruited Scott Silliman to serve as director. From its inception, the center has been at the forefront of analyzing legal and policy issues at the intersection of the Constitution and national security. True to his visionary nature, Robinson was thinking about and analyzing these profound issues long before the general public had ever heard the phrases "War on Terror," "enemy combatant," or "Guantanamo Bay."

Before and after his term as an active judge, Everett not only taught, but also continued to practice law at Everett, Everett, and Everett. As a lawyer, Robinson practiced both civil litigation and criminal law. His most famous cases as a lawyer are the racial gerrymandering cases from the 1990s. In 1992, the North Carolina General Assembly enacted a congressional redistricting plan that included two majority-black congressional districts. The districts were unusually shaped, including one district that snaked down I-85 from Durham to Charlotte. *See Shaw v. Reno*, 509 U.S. 630 (1993). Everett (as both a plaintiff and a lawyer) challenged the congressional redistricting plan as an unconstitutional racial gerrymander. Although some believed that precedent was against him, in June 1993, the United States Supreme Court agreed with Everett's theory and held that plaintiffs had stated a claim upon which relief could be granted under the Equal Protection Clause and remanded the action for further proceedings. *Id.* at 658.

On remand, I had the opportunity to observe Robinson's skill as an attorney and as a citizen. My law partner Thomas A. Farr and I represented a group of plaintiff-intervenors in the case. In that role, our firm litigated alongside Everett. He was an exceptional advocate and worked tirelessly (including many nights and weekends). Ultimately, the United States Supreme Court held that the congressional redistricting plan violated the Fourteenth Amendment because the plan was not narrowly tailored to serve a compelling state interest. *See Shaw v. Hunt*, 517 U.S. 899, 902 (1996). In successfully challenging the congressional redistricting plan, Robinson Everett held firm to his belief that such an unconstitutional redistricting plan was not healthy for the citizens of North Carolina or the nation. Some fellow Democrats criticized Robinson for pursuing the case. He ignored the criticism, in part, because as a citizen in Durham he had participated throughout his life in building coali-

tions and working with citizens of all races to improve Durham, North Carolina, and the United States.

Everett also was active in the Durham County Bar Association, the North Carolina Bar Association, the Federal Bar Association, and the American Bar Association. He received the highest honors that the North Carolina Bar Association and the Federal Bar Association awarded. In 2006, the North Carolina Bar Association recognized his exemplary skill as a lawyer when it inducted him into the North Carolina Bar Association's General Practice Hall of Fame.

Of course, Robinson did not limit his activities to the law. He was an entrepreneur who (along with his mother) was a very successful real estate developer. The Everetts also founded and operated numerous television stations throughout North and South Carolina.

Robinson had a deep and profound faith in God and was an active member of the First Presbyterian Church of Durham, where he served in many leadership roles. He lived the adage: "Preach the Gospel at all times. Use words if necessary." He also knew that "to whom much is given, much is expected." In 2002, he established the Reuben Oscar and Robinson O. Everett Scholarship Endowment at Duke Law School. In addition, following his mother's death, he oversaw a $14,000,000 gift to the University of North Carolina School of Law and Duke Law School.

Notwithstanding all of his professional accomplishments, if you asked Robinson what the best day of his life was, he would tell you, unequivocally, that it was the day Lynn McGregor married him. Lynn described Robinson lovingly as her "gentle giant." Robinson described Lynn as the best person he knew. Robinson and Lynn have three sons, Rob Jr., Greg, and Luke. Their sons will tell you that they had the best dad in the world. Two of Robinson and Lynn's sons are now North Carolina lawyers. In fact, in 2008, Rob Jr., Luke, and Luke's wife Sherry all graduated from the University of North Carolina School of Law. Rob Jr. practices in Raleigh, and Luke and Sherry practice at Everett and Everett. Greg is a successful entrepreneur in North and South Carolina. Robinson found no greater joy than spending time with Lynn, his children, and his grandchildren. He loved them and always let them know it.

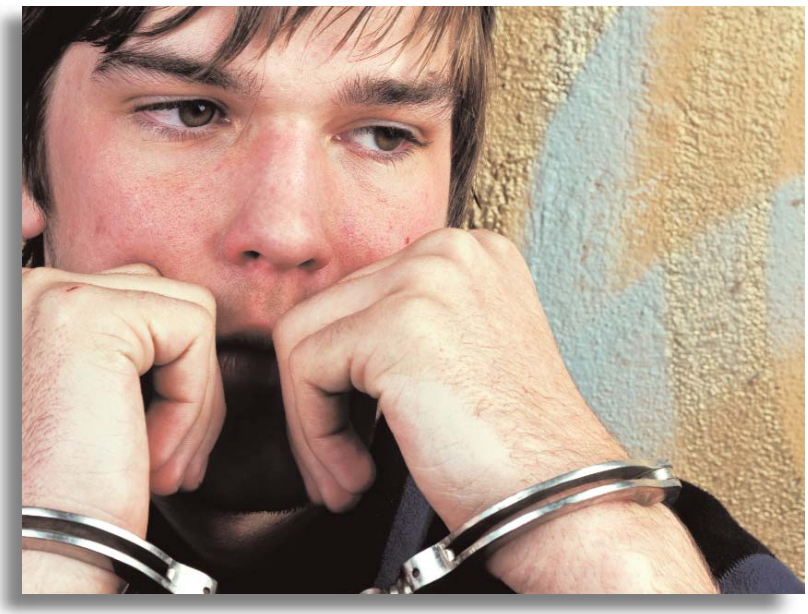
In April 2008, Duke Law School awarded Robinson Everett the A. Kenneth Pye Award for his life-long commitment to Duke Law School. At the presentation, I noted that I had known him for 24 years and had never heard him say anything unkind about another person. I also stated (and continue to believe) that Robinson Everett is living proof of the paradox that the more a person gives to this world, the more he receives in return. He spent a lifetime giving to Durham, to North Carolina, to the United States, to his family, to his students, to his faculty colleagues, to his fellow members of the military, to his judicial colleagues, and to his friends. If there ever was a person who is a modern day George Wythe, that person is Robinson Oscar Everett. As citizens and as lawyers, we would do well to emulate Robinson Everett's life and character. ■

James Dever is a United States District Judge in the United States District Court for the Eastern District of North Carolina.

Autism in the Criminal Justice System

By Judge Kimberly Taylor, Dr. Gary Mesibov, and Dennis Debbaudt

Autism Spectrum Disorder (ASD) diagnoses are increasing at an alarming rate in North Carolina, across the country, and around the world. This increase in the incidence of ASD suggests that the criminal justice system (CJS) will certainly see increased contact with individuals with autism as victims, witnesses, and/or offenders. All criminal justice professionals who have contact with individuals who have ASD need to establish clear and consistent communication methods, verify facts, make appropriate accommodations, and ensure fair justice and consequences for all concerned.



Communications, behaviors, intent, and ability levels of people with autism vary greatly and present challenges for even the most experienced criminal justice professionals. Attorneys and judges must avoid misinterpretation of behaviors and characteristics typical of those with autism since these behaviors and characteristics could be misinterpreted as evidence of guilt, indifference, or lack of remorse.[1]

What Is Autism?

Autism is defined as a neuro-developmental disability, meaning that it involves the brain and starts very early in life when the brain is still forming and still changeable. Autism involves differences and difficulties in several areas: social interaction; communication; the presence of narrow, repetitive behaviors; and adjusting to change. ASD occurs more frequently in males than females—usually a four-to-one ratio. Additionally, there is a wide range in intellectual ability for individuals with ASD where IQs span from below 25 to above 150.

Low-Functioning Individuals

The term "low-functioning" may be used to describe persons with lower IQs. These per-sons have difficulty with basic life skills such as safely crossing a street, negotiating a

financial transaction, and making sense of social interactions. They typically have a caregiver with them at all times. Oftentimes, these low-functioning individuals are also nonverbal. Those who are nonverbal may use alternative communication such as American or other sign language, Picture Exchange Communications Systems (PECS), or computers that can speak for them.

Although individuals with ASD could commit a criminal offense, their intent to do so could be difficult to determine, questionable in court, and their competency may not reach the level of responsibility for an offense. Also, in most circumstances, individuals would be greatly compromised in their ability to assist in their own defense.

As crime victims rather than criminal offenders, individuals with ASD present the perfect victim. People with ASD have great difficulty communicating details and experiences of their victimization, thus resulting in a lack of credibility in interview and courtroom situations. This reality creates major issues regarding time and resource considerations for investigators and attorneys.

Investigators and attorneys should consider the following accommodations and guidelines in preparation for the victim-witness interview of a person with ASD:

- Interview the care provider, parent, or person who first heard the disclosure of victimization.
- Investigate the possibility of multiple victims by interviewing all persons with whom the perpetrator had contact.
- Review all records of assessment.
- Discover the person's communication strengths and deficits.
- Interview care providers and persons who know the individual with ASD to discover how he or she best receives and provides information.
- Consider videotaping all interviews.
- Plan questioning based on the person's ability level.
- Use the person's first name.
- Speak to adults as adults; children as children.
- Use simple, direct language.
- Deal with one issue at a time.
- Have the individual recreate events in his or her own words—a narrative interview.
- Make sure both your word choice and the individual's word choice have the same meaning to each person.
- Make sure all individuals understand to whom a pronoun refers when using pronouns.
- Ensure question length is short, direct, and concise.
- Utilize maximum patience, as formulating answers takes longer for individuals with ASD.
- Ask for and get permission before repeating questions.
- Become convinced of the person's ability to tell the truth.
- The person may have short attention span; take frequent breaks.
- Be alert to nonverbal cues indicating the person is confused or does not agree to your statements or questions. Get confirmation through direct questions.[2]

High Functioning Individuals

"High-functioning autism" or "Asperger syndrome" are terms describing persons who are verbal, may hold jobs, and live semi- or fully independent lives. Currently, no statistics have been developed about the rate of contacts young people on the autism spectrum will have with the criminal justice system, although research indicates that people with autism spectrum disorders and other developmental disabilities will have up to seven times more contacts with law enforcement during their lifetimes than members of the general population.[3] While there is no evidence to suggest that they will commit crime at a higher rate than the general population, those that do and can be held responsible for their acts will typically be the more independent, so-called higher functioning persons with autism or Asperger syndrome.[4]

Persons with ASD often get into trouble without even realizing they have committed an offense. Offenses such as making threatening statements; personal, telephone, or internet stalking; inappropriate sexual advances; downloading child pornography; accomplice crime with false friends; and making physical outbursts at school or in the community, would certainly strike most of society as offenses which demand some sort of punishment. This assumption, though valid at face value, may not take into account the particular issues that challenge the ASD individual. Problems with sensory overload, poor social awareness, semantic misunderstandings, inability to deal with changes in routine or structure, and little to no understanding of nonverbal communication, are the very kinds of things that make more appropriate responses to society very difficult for someone with ASD. For example, what appears as antisocial behavior to the "regular" world is often simply the manifestation of the ASD person's social misunderstandings. While most would see too many phone calls in the middle of the night as aberrant phone stalking, the ASD person might well view the situation as one friend wanting to talk to another, no matter the time or frequency of calls. And a physical outburst at school might well be related to the ASD person's sensory dysfunction, inability to deal with interruptions in the daily routine, or emotional liability. Emotional liability means to be susceptible to change, error, or instability and stems from its Latin roots meaning prone to slip. This often presents itself in individuals with ASD—their emotions can change quickly and they can become upset, scared, or anxious very quickly. They may also be extremely anxious one minute, and then calm the next, or vice versa. So, while the individual with ASD might have committed the offense in question, the intent might well have been anything other than to do harm.[5]

The offender may appear as normal, be more able academically and more independent than a person with classic or low-functioning autism. Yet, these strengths can mask social and communication deficits that go unseen or misunderstood by those with whom they have contact.

Their communication difficulties include hardships in making sense of the verbal and body language of others. Their difficulty in maintaining eye contact or insistence on changing the subject of conversation to a topic of their choice—all typical diagnostic behaviors of a person with autism—can mislead an investigator, attorney, or judge. They may appear to lack respect and be a "rude, fidgety, and belligerent" person who, by nature of his lack of eye contact and evasive conversation, appears to have something to hide. Standard interrogation techniques that utilize trickery and deceit can confuse the concrete-thinking person who has autism or Asperger syndrome into producing a misleading statement or false confession. They can become overly influenced by the friendly interrogator. Isolated and in a never-ending search for friends, the person can easily be led into saying whatever his new friend wants to hear.[6]

What are ASD dilemmas for prosecutors, defense attorneys, probation officers, and judges? Left unexplained, the person's courtroom displays of laughing or giggling, their

loud vocal tone, and aloof body language—also inherent to the condition of ASD—could lead many judges to conclude that this is, indeed, a guilty and remorseless person. Everything in the suspect's demeanor says so. The person may very well have no idea of the effect their behavior is having on a judge, jury, or even his or her own defense attorney. Even the best defense attorney might see guilt in his client's display of behaviors.

During questioning, initial contact, or in a courtroom setting, a person with ASD might display these additional behaviors and characteristics:

- An inability to quickly process and respond to requests, commands, and questions.
- Be a poor listener, may not seem to care about what you have to say.
- Be unable to deduce what others are thinking and why they are thinking it.
- Repeat the words, statements, body language, and mannerisms of the investigator.
- Make statements that seem tactless or brutally honest. If you are overweight, bald, or smell of smoke or perfume, they may bluntly remind you.
- Have difficulty recognizing slang terms, innuendo, colloquialisms, figures of speech, or jokes. Ask, "What's up your sleeve?" and the concrete answer may be, "My arm."
- The ASD person might have difficulty understanding communications such as rolling of eyes, raised eyebrows, and other nonverbal signs of your frustration and disbelief.[7]

Situations can arise for individuals with autism where their logic does not work or where their ability to integrate different sources of information is more limited. Even when it may seem to you that your question is clear, misinterpretations can occur.

What they have trouble doing is conceptualizing—putting together information in complicated situations. So they have trouble with context and figuring out how things get connected and what they mean. They look at one situation, they look at it concretely, and don't always look at it in the context of trying to figure out what would be the different connections in that situation. This can impact legal situations with which you may be involved. One criteria is, what would a normal person do in this situation? A person with autism is not necessarily normal in the way that they process the information and put together the different parts. Thus, that standard may need to be modified a bit in order to understand them. And what is a person who thinks like this person expected to do? And what might they not be expected to be able to do? All of this needs to be considered.

Criminal justice professionals should be aware that a person with autism has less ability to understand verbal communication. The simplest thing professionals can do to be helpful is to speak slowly. Individuals with ASD process information much more slowly than typical people who have their same intelligence level and skills.

Another helpful tool is to always have a pen and paper available. If in doubt, write it down. If they are in doubt, let them write it down. Their visual skills are much stronger than their auditory skills.

Individuals with ASD are a concrete group; therefore, criminal justice professionals must not mistake their concreteness for making a wise-crack. One child with autism was given an intelligence test in which he had to take felt pieces and put them together to make a another child's face. The child made a face with a big smile. The child with autism was then asked, "How does the child feel?" and he responded, "Soft." A teenager with autism was asked by a questioner who knew he had recently turned fifteen, "How old are you?" The teen replied, "Fifteen." The questioner then asked, "When was that?" "On my birthday," he replied. Somebody could take this type of response as a wise-crack because most people would understand what the questioner meant. However, very often people with autism have trouble with the context, connotation, and/or the meaning of the sentence. For this reason, professionals must be very direct and very concrete in their language choice when interacting with individuals with autism, and they must never rush to judgment concerning the responses of people with autism. Frequently, their responses seem to be disrespectful, "smart aleck," and off topic, but this behavior is normal for the autism spectrum.

Weak verbal abilities often mask much higher intelligence levels in people with autism. For example, a lot of times individuals with ASD don't understand what a teacher is saying. That gets them into trouble because the teacher thinks they're not listening and not obeying. Very often, to get out of this situation, they'll just agree. As a result, the teacher says, "Do you hear me," Do you understand me?" They don't understand, but they can tell the teacher is getting annoyed. Finally, they just say, "Yes." They have learned that an affirmative answer gets them out of the situation. Thus, in interview settings, the effects of pushing too hard or too intensely for answers will generate affirmative answers from individuals with autism which do not necessarily reflect any truth.

People with autism have reported that it is really hard for them to concentrate and understand what they are saying when they are looking directly at somebody. Many people in society see this as rude behavior. A judge or attorney who asks questions and then observes that the person with autism is looking off into the distance may assume this reflects a lack of respect. In reality, this is normal behavior for the individual. When interviewed, one young man with autism made the point, "I keep telling people 'I'm looking at you. I'm looking at you. I'm looking at you. I'm looking at you. I don't understand a word that you're saying, but I'm looking at you. I'm looking at you.'" And some people with autism have actually said, "You can have your choice with me. You can have me look at you or you can have me understand what you're saying. I can't do both."

Interview/Interrogation Techniques

So, what can the criminal justice professional do to prepare for interactions with persons with ASD? Try to avoid jumping to conclusions or making attributions based on unusual or "inappropriate behaviors." Remember that autism is a social impairment. A component of the social impairment is that individuals with autism may appear to be impolite or disrespectful.

Criminal justice professionals who interact with and question people with autism or Asperger syndrome will enjoy the best opportunity for success by incorporating the following strategies:

- Approach in a quiet, non-threatening manner.
- Talk calmly in a moderate voice.
- Do not interpret limited eye contact as deceit or disrespect.
- Avoid metaphorical questions that cause confusion when taken literally (i.e., a hard time, Are you pulling my leg?, Cat got your tongue?, What's up your sleeve?, spread eagle, or You think you are cool?).
- Avoid body language that can cause confusion. Be alert to a person modeling your body language.
- Understand the need to repeat and rephrase questions.
- Understand that communications will

take longer to establish.

- Use simple and direct instructions and allow for delayed responses to questions, directions, and commands.
- Seek assistance from objective professionals who are familiar with ASD.[8]

The interviewer should develop a plan of action that incorporates patience and persistence on his or her part. The interviewer is interacting with somebody who might not always get the message, question, or concept straight. Much patience is necessary because impatience may make them very anxious. They really do want to please; they just don't know how to do that all the time. But they can sometimes tell if they're doing it successfully or not. Therefore, practice patience in all situations when dealing with individuals with autism or Asperger syndrome. Interviewers must understand they will not necessarily get the answer the first time or during one modality of questioning because of the person's understanding of the context, and your speed and pacing is going to affect it. They are inconsistent processors sometimes. So, they might understand one question perfectly well and then understand the next question not at all. Sometimes interviewers may have to write something down or draw it out and let them look at it. The key is being patient so you don't get them emotionally aroused and upset. Being supportive and continuing to try different methods of communication will help the person with autism to answer in a way that can be understood and make sense to all involved parties.

Environmental Accommodations

People with autism may have more difficulty in that they are overstimulated by the sensory environment—the sights and sounds that will distress them. Noises are louder for them. Normal background noise that may seem negligible to the average person can be completely overwhelming or overpowering to this population. When this occurs, not only can they not hear what people are asking them, but they can sometimes become very anxious and even terrorized by the situation or by the noise.

Additionally, lights are often brighter for those with ASD. For example, when a person with autism is outside on a sunny day—which in North Carolina most of us love—the light may be very overstimulating, like somebody shining a very bright flashlight right in their eyes. Therefore, in many environments, the lighting itself causes distress.

Intense sensitivity can extend to any of the senses and interrupt functioning on many levels. Many very capable people with autism will score high on an IQ test, but can have horrible school records. The common noise, disruption, and movement in a typical classroom can be so disruptive that they cannot focus on that one thing in the classroom on which they are supposed to focusing. The same situation may exist in a courtroom or interview room.

As a result, adjustments in the environment can be crucial to a successful interview. Consider making accommodations to the sensory environment when interacting with a victim, witness, or offender who has autism or Asperger syndrome. Keep lighting low; use subdued colors; limit distracting images or pictures; eliminate the presence of non-essential personnel; avoid using perfume, aftershave, or scented soaps; and avoid touching the person with autism.

Sentencing Considerations

In those cases where it has become clear that the person has committed the crime and qualifies for a diversion or probation program, the offender may be further stymied by his autism. Traditional options might include group therapy with other offenders. Meeting with strangers, group discussions about personal feelings, sharing personal information or contributing comments about others may be difficult conditions for the person with ASD to meet.[9]

Corrections professionals can find success with the ASD population when they create diversion or probation programs that:

- Use language and terms the person will understand.
- Avoid the use of technical terms.
- Involve persons who the individual knows and trusts.
- Describe (use photographs) beforehand the persons the individual will work with and venues in which they will meet.
- Assure the individual that the new persons are safe.
- Utilize the individual's strong rote memory skills.
- Teach the rules of program with visual aids.
- Use pictures to describe actions and situations.
- Create a chronological list of the program, develop a poster with bullet points.
- Discover what is important to the person with ASD. Avoid trying to make them fit into what is important to you.[10]

If an individual with autism is taken into custody, alert jail authorities. This person may be at risk in the general jail population. For short-term custody, consider segregation, monitoring, and a professional medical and development evaluation.

Incarceration will be fraught with risk for the person and anyone in contact with him or her. Their direct manner, offbeat behaviors, and characteristics may be read by other inmates as an invitation to exploit and control. Corrections professionals may see a rude, incorrigible person. Good behavior privileges will be hard to earn. Correctional professionals who work with the incarcerated ASD population will benefit greatly from comprehensive training, at the least a good briefing and access to ongoing assistance from a professional who is familiar with autism.[11]

Conclusion

Some people have described autism as a culture. Consider the need for a translator when dealing with a person who speaks little or no English. Working with someone with autism is analogous to that situation in that successful communication is blocked, but not as easily overcome. Autism, as a culture, is an analogy that emphasizes the very different ways the affected person processes information and understands things—very much as people from different cultures view things differently.

We are obligated by our profession to understand that those cultural differences may loom larger in a person with autism than most cultural differences stemming from language, tradition, or history. The cultural differences of autism come from the way the brain actually works, requiring a total difference in understanding and perception. Our role becomes one of translator. The quality of our translation is dependent upon our resourcefulness, knowledge of autism, patience, and understanding. We can and must meet the challenges of this growing population by embracing our roles in the process.

Consider utilizing as a resource an objective autism professional who can act as a "friend of the court." This person can help interpret the behaviors and communications of persons with autism and can help people understand what the person with autism understands. He or she can also advise about the impact of the language the questioner is using. Each case will be different, each fact pattern is different, and the ability of people

Joint Legislative Study Committee on Autism Spectrum Disorders

Citizens with autism should feel safe, understood, and supported in their communities by public authorities who protect and serve them in the same ways as the general population. That has not always been the case.

As a result of a tragic case in Statesville, North Carolina, involving a low-functioning man with autism who tragically died while in custody of the police, a Joint Legislative Study Committee on Autism Spectrum Disorder, Law Enforcement, Public Safety, and First Responders was established in 2005 and reappointed in 2007 by the president pro tempore of the Senate and the Speaker of the House of Representatives. The committee was authorized to study the availability and appropriateness of autism-specific training and education for law enforcement personnel, community colleges, public safety personnel, first responder units, judges, district attorneys, magistrates, and related organizations.

The charge of the committee was to make recommendations to the General Assembly based on their findings. Several recommendations were adopted and implemented; additionally, the General Assembly appropriated a grant to fund a training video to raise awareness of autism within the judicial system.

The article in this edition of North Carolina State Bar *Journal* is written to supplement the information and illustrations of the video *Autism In The Criminal Justice System,* which was produced for use by the University of North Carolina School of Government and other legal organizations in consultation with UNC Division TEACCH (The Treatment and Education of Autistic and Communication-Handicapped Children), UNC School of Medicine, Carolina Institute of Developmental Disabilities, to develop continuing legal education training regarding the identification, safety, and needs of those with autism in their communities.

For more information and to view *Autism in the Criminal Justice System*, please visit www.lewisdaggett.com/autismawareness. ■

with ASD to form intent and to control actions certainly differs from one individual to the next. All concerned parties should consider choosing an expert who can both interpret and testify in court if needed. There are so many things in life that the person with autism can misunderstand even though they are trying hard and doing their best. The world is just complicated for them. ■

Kimberly Taylor is a retired resident superior court judge for the 22nd Judicial District. She is also a national board member of the Autism Society. Her middle son was diagnosed with autism at age three.

Dr. Gary Mesibov is a professor of psychology in the departments of Psychiatry and Psychology at the University of North Carolina at Chapel Hill. He has also served as director for the past 16 years of Division TEACCH, North Carolina's statewide program serving children and adults with autism and their families. He has 35 years of professional experience working in the field of Autism Spectrum Disorders (ASD).

Dennis Debbaudt is the proud father of Brad, a young man who has autism. A professional investigator and law enforcement trainer, Dennis has authored or co-authored over 30 autism safety-related articles and books including Autism, Advocates, and Law Enforcement Professionals: Recognizing and Reducing Risk Situations for People with Autism Spectrum Disorders *and* Contact with Individuals with Autism. *Debbaudt is co-producer of the* Autism in the Criminal Justice System *video.*

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Under and By Virtue

By Lance P. Martin

"Under and by virtue of the power of sale provision contained in that certain Deed of Trust . . ." Why is it always a certain deed of trust, wondered the lawyer as he read the Notice of Sale in a halting, almost embarrassed monotone sandpapered of all unnecessary inflection. You never see an uncertain deed of trust or a somewhat certain deed of trust, he thought. If it's a deed of trust, you can't bet it's certain. That's for certain.

The lawyer, with the banker next to him, stood at the top of concrete steps flecked with pigeon droppings and cigarette ash. Some fading graffiti in a corner suggested the Lascaux cave paintings, if those cavemen had been inspired by malt liquor instead of horses. In theory, he belonged on the steps to the front door of the courthouse, but the actual front door was really a side door with a metal detector. This side alcove had become, by custom, the designated spot for public sales. It also doubled as the smoking area. Jurors, defendants, and court staff lingered around the periphery and leaned on columns and puffed. The tobacco smoke hung thick as cotton candy—nicotine-flavored, carcinogenic cotton candy—as the lawyer continued to read aloud. In the distance, a young deputy twittered.

"Thence continuing with the centerline of State Road 1112, South 10 degrees 54' 23" West 55.03 feet to a P.K. Nail..." Now deep into the fourth paragraph of the legal description, the metes and bounds and the secondhand smoke conspired to dry his throat. It was only 10:30, but already the temperature approached ninety degrees. The sun found him wherever he stood in the alcove, and the sweat saturated his undershirt and oxford and now advanced, like a matinee monster, into his wool suit. Sweat beads plopped onto the Notice of Sale, blurring one of the calls. But he had already read that part.

"Hey? Let me ask you something." A member of the audience had brushed the banker aside and approached him. He did not look like he was there to place a bid.

"I'm in the middle of a foreclosure sale, sir. What is it?"

"You a lawyer?"

"Yes, I am a lawyer." Here we go, the lawyer thought to himself.

"Take a look at these papers." He pulled a tri-folded stack of papers from the back pocket of his jeans. They were crumpled and looked like they had been in that back pocket for the ride over. "Careful, they are the originals."

"Sir, I can't look at that right now. I have to finish this sale."

"Alright, I can wait." He moved back into the gallery and took another cigarette from someone named Charlene.

"Beginning on two blackgums, running North 57 1/2 East 18 poles to a stake..." The lawyer was getting more hoarse with ever mete and bound.

Pressing on with tonsorial endurance, the lawyer, as if he were narrating the side effects in a drug commercial, disclaimed every warranty and representation imaginable to anyone who would listen. As-is, where-is. Some restrictions may apply. May or may not actually be real estate—might be a slow-rolling double-wide. Void where prohibited. Sorry Swain County. The humidity was thick, almost as thick as the air of self-pity engulfing the lawyer as he read and ruminated on his situation. A year ago, he was not sweating through his handsome collection of wool suits, except when he went to a fancy Thai lunch on the client's tab. He would not be a hard two hours' drive from Charlotte. He would not be conducting his first of three foreclosure sales in a single day, would not be reading Notices of Sale to stragglers, if he was lucky, or more often to no one but the pigeons. If a tree falls in the woods and no one is there to hear it, does it still make a sound? If a Notice of Sale is read on the courthouse steps and no one is there to hear it, does it still count under Chapter 45?

"Hey, how much of that TARP money did you get?" shouted someone from the crowd. The banker went pale, the lawyer kept reading.

Back then, he spent his days in a LEED-certified, climate-controlled office on one of the higher floors of one of the higher buildings on one of the pricier blocks of downtown. He worked with deeds of trust every day, though he never actually saw one. He was part of one of these capital markets departments—there were many in the city—who helped the big banks sell their real estate-secured loans on the market. He hadn't studied the subject in law school and didn't quite understand how it worked. Credit-default swaps. Derivatives. Synthetic collateralized debt obligations. It was a different world and a different language? What is the leading cause of injury among capital markets attorneys? Tranche Foot. That joke killed in section meetings. He just kept generating the form documents that turned all those loans, from sub-prime to prime-time, into something like seven-layer dip, then sold off each layer to those parties who liked the price for the salsa or guacamole. No problem with the concept, except that he was part of a system that sold the refried beans as Kobe beef, the sour cream as crème fraiche. But he never

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Sixth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of eight committee members. The submission that earned second prize is published in this edition of the *Journal*.

really thought about it until the end. The flow of paper never stopped and the salary kept him in those expensive suits, the kind that lack the breathability required for outdoor duty on North Carolina summer days. It had to make sense to somebody or they wouldn't be doing it, right?

It was only when the end came, and it came suddenly, his practice section folding faster than an all-vegan restaurant in Lenoir County, that he reflected on that seven-layer dip. And he concluded that maybe those refried beans were only refried beans after all. The firm who had given him a summer associate position as a 1L and 2L and then hired him right out of law school now gave him two weeks pay and told him he could fill a box with office supplies. Some restrictions did apply—no computer equipment. He had no job and a dubious future in a fallow job market, but at least he had a lifetime supply of Post-It notes. Four months later, after being turned down by every other law firm in the state ("It's not you. It's us."), he took a contract position for a foreclosure mill, covering hearings and sales for $50 a pop.

The lawyer kept reading. He looked over at the banker and noticed that he had a button on his chest with a slogan lauding the virtues of his employer—something about loyalty and commitment. The button masked the embroidered logo of his former employer—a competitor bank.

The car, an American model soon to be discontinued, must have once been a glittering lipstick pink but now was on the softer side of Pepto-Bismol, coated in dust, and pimpled with dents. The driver, a former Mary Kay saleswoman once given the "franchise tag" by the tri-county region, slammed it with brake-screeching fury into a handicapped parking spot a few paces from the aforementioned alcove used for public sales (and smoking). In a single fluid motion, she uppercut the gear shift into park, yanked her kid from the back seat, and exited the vehicle.

"Stop!" she cried, toddler on hip, eyes on lawyer, high heels on hot concrete. "Don't let him take my house!"

The banker, who had receded to the back of the alcove, looked at the lawyer and spun his finger rapidly. It could mean only one of two things: either he was trying to flick off a particularly sticky booger or he wanted the lawyer to read faster. The lawyer dove into the final paragraphs of the notice like an auctioneer, plowing through the sentences. Damn the punctuation, full speed ahead, he thought. He was fast but not fast enough.

"Stop! Someone please stop him!" The owner had reached the alcove. She was panting and red-faced, like a television minister with a little extra mascara. She wore a short skirt and V-necked blouse the way a sausage wears casing. She was older than the lawyer by at least 20 years and looked like she could body-slam him off the top turnbuckle without letting go of her kid. She stepped into the lawyer's personal space, then addressed the crowd:

"This man is trying to steal my house!"

The lawyer turned to the banker for guidance. The alcove was empty. In the distance, tires squealed.

"Ma'am, I'm just doing my job," the lawyer said.

"You should be ashamed of yourself, you filthy thief!" she yelled for all to hear.

"Ma'am, the bank has an order..." the lawyer stopped in mid-sentence as he noticed the crowd closing in on him.

"How can you live with yourself?" she continued. "How can you take my house from me? How can you take this child's house?" Here she squeezed the child's cheeks for effect. The child clung to her like a koala, a koala in a eucalyptus grove that was being clear cut.

"Let's get this sucker!" said a bystander. "Charlene, hold my papers."

"Ma'am, you have the right to redeem..." the lawyer said.

"Oh, redeem this," the owner cried, clutching a part of her anatomy in a way that was entirely inappropriate for viewing by the child or the lawyer. "I put my heart and soul into that house and for what? So you could just steal it from me the first time I miss a payment."

"Actually, ma'am, you never..." the lawyer implored, even as he retreated slowly towards the back wall of the alcove.

"You just gonna kick her out into the street?" asked someone in the crowd with a sudden interest in the plight of the homeless.

"Yeah, what about the kid?" asked a maternal type, just before she blew cigarette smoke into the kid's face. "Don't you believe the children are our future?"

"Have you complied in all respects with the Emergency Program to Reduce Home Foreclosures?" asked Charlene without looking up from a back issue of *US Weekly*.

The crowd was rapidly turning into one of those mobs you see only in Frankenstein monster movies or political rallies, and the lawyer knew that soon some opportunistic street vendor would start offering a two-for-one special on tar and feathers. But the lawyer didn't go to a first-tier law school (and he had the student loan payments to prove it) for nothing, and in that moment he drew on all his training and savvy and said: "Hey look over there! Is that Dale Earnhardt Jr.?"

And then, in the one to two seconds when the crowd, including the little Koala-clinging toddler, turned (and turned back, teeth bared), he inhaled as if he intended to swim Ocracoke Sound underwater and slurred as fast as his tongue would allow: "Do I hear any bids? The trustee bids on behalf of the bank the sum of $425,000. Do I hear any other bids? Going once, going twice..."

"Ouch!" The lawyer screamed. Something had plunked him on the cheek. A few more small projectiles came sailing his way, one catching him in the forehead. "What is that?"

"Hit him again!" the owner told her son, and her son's little chubby arm obliged with a side-arm delivery.

The lawyer sidestepped the incoming object and looked down at his feet. "Are those Monopoly houses?" he asked.

"They hotels, you imbecile," said a bystander. "They red, can't you see?"

"Break it up!" The deputy had stopped twittering and come to the rescue. On cue, the crowd dispersed back into pairs or singles, copping another smoke, looking at their papers, shooting the lawyer a menacing look. The owner cried loudly, with intermittent fits of spasmodic sobbing. The child began to wail as well. The lawyer noticed a red whelp on the toddler's leg that suggested a pre-wail pinch.

The deputy asked to hear both sides. The lawyer put on his case. Loan secured by Deed of Trust. Default. Demand. No response. Notice. Hearing. Order allowing Foreclosure. More notice. Publication. Sale. The owner dabbed at her teary eyes and said that the house was her life, and if the bank took it, she would have nothing. The deputy ruled that the sale would have to be postponed. The lawyer took an immediate appeal challenging the deputy's jurisdiction. The appeal was heard by a one-judge panel consisting of the deputy. He upheld his ruling. When the deputy then denied the lawyer's petition for discretionary review, the lawyer conceded defeat. He put his papers in his briefcase and headed for his

car. Looking at his watch, he saw that he would not have time for lunch before his next sale two counties over.

As he walked away, he heard a by-stander shout: "Hey! You promised to look at these papers."

Back in the alcove, the owner thanked the deputy.

"My pleasure, ma'am. Just trying to help. Hate to see you lose your house."

"Well, I do appreciate it." The tears were gone.

"Is it just you and the child living in the house?" the deputy asked.

"Oh no, we don't live in the house. It's just a spec house I'm trying to flip. I got about a dozen of 'em. Can you believe this market? Say, do you own or do you rent?" ■

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President Interview (cont.)

not only our present needs, including the needs of the Board of Law Examiners and the LAP program, but will also have ample room for growth as our regulatory functions increase over the coming years. The new building will also allow the State Bar Council to hold its quarterly meetings in the facility rather than in hotel space which, of course, is expensive. In addition, we are striving for LEED certification, which will allow us to operate in a "green" and efficient manner. Overall, I believe we will see an extremely favorable return on our investment.

The construction will be financed through the sale of our existing building, cash reserves, and member dues. While many unknown variables can affect projections, we currently believe that a further dues increase will not be necessary for at least five years. Our Facilities Committee is investigating all possible financing avenues, including the sale of tax-exempt bonds, to minimize the burden on our members. All aspects of this project are being directed by a dedicated Facilities Committee, chaired by Keith Kapp. We have been fortunate to have the help of volunteers/advisory members from outside the council who have guided us through the selection of an architect, financing issues, and contract negotiations. We are very grateful to Leslie Silverstein, Mary Nash Rusher and Tom Davis for the substantial amount of time they have devoted to this project over the past year. We are delighted that Glenn Dunn will be soon joining the committee as an advisory member.

Q: In connection with the State Bar's new headquarters, the council plans to establish a foundation to accept contributions from various entities and individuals. How will this work, who will be involved, and who will be solicited?

At the October meeting, the council voted to establish a foundation to accept contributions to supplement the funds available for the new building. The details of the foundation are yet to be determined, but it will likely be organized as a 501(c)(3) entity with an independent board of trustees. The council, of course, is mindful that as a regulatory agency, it must be careful to avoid conflicts of interest. I anticipate that in the coming months, procedures to prevent conflicts will be carefully considered.

Q: The council has proposed that all newly admitted lawyers be required to take a special 12-hour CLE course on professionalism, professional responsibility, law office management, and perhaps other fundamental subjects. Why? Do you support the proposal?

I strongly support this proposal. With the increase in the number of newly licensed lawyers entering the profession at the same time that law firms are slowing their pace of hiring and even laying off lawyers, we have too many young attorneys who have no jobs, no mentoring, large debt, and who simply hang out a shingle. Law school has not taught them how to operate a law office, how to maintain a trust account, or how to act in a courtroom. Having the benefit of mentoring from great lawyers during my younger days as an attorney, I find it hard to imagine entering the profession without the benefit of that guidance. Hopefully this 12-hour course will bridge some of that gap.

Q: You are currently chairing a committee that is trying to decide whether it makes sense for the State Bar to be soliciting demographic information from its members regarding such characteristics as race, gender, and ethnicity. What type of information is the committee considering?

Currently we have no idea about the demographics of lawyers practicing in North Carolina. A number of other mandatory state bars in the country collect demographic data from their membership, and we currently have a committee looking at their experiences. Specifically, the committee is asking other state bars about how they collect the data, the cost associated with the collection, whether their collection is voluntary or mandatory, how the data is used, and whether the data has proven to be helpful.

In a 2004 report published by the ABA, the Commission on Racial and Ethnic Diversity in the Profession stated that this type of data "plays a critical role in promoting the progress of minorities in the profession." The North Carolina Bar Association Diversity Task Force came to a similar conclusion. In the absence of this data, it is extremely difficult to measure progress in diversity or to evaluate where a program's focus is best placed.

Following our July council meeting, I received a letter from Mark Merritt, chair of the Lawyers Assistance Program. He wrote that the LAP Board had concluded that the collection of demographic data would be very beneficial to the LAP program: "The Lawyers Assistance Program believes that such data could be useful in helping us learn whether substance or mental and emotional illness affects certain groups within the Bar more than others. Such information would be helpful to target our treatment and education efforts." We have also received positive support from the North Carolina Bar Association, the Minorities in the Professions Committee, and The North Carolina Association of Women Attorneys, among other groups.

The State Bar committee is evaluating the feedback from all of these groups as well as the information obtained from other states. It expects to have a report at the January 2010 State Bar meeting.

Q: What do you enjoy doing when you're not practicing law or working for the State Bar?

Traveling, reading, watching Carolina basketball, "vegging" at the beach, and, most of all, spending time with my family.

Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

I'll let you know at the end of the year. ■

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